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S. HRG. 99-211

TO MODIFY THE EXCLUSIONARY RULE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 237

A BILL TO AMEND TITLE 18 TO LIMIT THE APPLICATION OF THE EXCLUSIONARY RULE

OCTOBER 2, 1985

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TO MODIFY THE EXCLUSIONARY RULE

WEDNESDAY, OCTOBER 2, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Mitch McConnell presiding.

Present: Senators Grassley, Metzenbaum, DeConcini, Biden, Specter, and Simon.

Staff present: Victor Maddox, majority counsel; William S. Miller, majority counsel; Charles Reid, minority counsel.

OPENING STATEMENT OF SENATOR MITCH McCONNELL

Senator McCONNELL [presiding]. The hearing will come to order.

Good morning, ladies and gentlemen. Chairman Thurmond has asked me to chair today's hearing on S. 237, a bill that would limit the application of the exclusionary rule. There have been other hearings on this issue, so we already have a fairly well developed record on this matter.

Not having been a Member of the Senate when those prior hearings occurred, I am pleased to be here today to accept the testimony of our distinguished witnesses. As all of you know, the exclusionary rule has been the subject of a great deal of controversy since it was announced by the Supreme Court early in this century.

No one can argue with the salutary nature of the rule. The right to be free from unlawful search and seizure is a right that is, in many senses, fundamental to the American constitutional approach to government.

Heavy-handed police conduct is an all too common fact of life in so many parts of the world that we rightly approach with caution any effort to modify the restraints on such conduct that have been developed here.

Yet caution ought not to lead to paralysis. Too many times, we have seen evidence declared "fruit of the poisonous tree," and rejected, with the criminal set free, despite the best of faith on the part of our law enforcement officials. Some of the most sensational cases are well known, but more troublesome are the cases that are known only in the compilations of statistics.

These are the garden variety criminal cases in which the criminals are turned loose, and the hands of our law enforcement agencies tied because of unrealistic restrictions on the use of evidence.

I believe that S. 237 is a reasonable modification to the exclusionary rule. It declares in simple and sensible terms, that evidence that is otherwise admissible shall be admitted if the police obtained it in good faith. With this change, the object of the rule, police misconduct, would once again become the target of the rule.

[Text of S. 237 follows:]

II

99TH CONGRESS
1ST SESSION

S. 237

To amend title 18 to limit the application of the exclusionary rule.

IN THE SENATE OF THE UNITED STATES

JANUARY 22 (legislative day, JANUARY 21), 1985

Mr. **THURMOND** (for himself, Mr. **LAXALT**, Mr. **HATCH**, Mr. **ABDNOR**, Mr. **CHILES**, Mr. **DOMENICI**, Mr. **LONG**, Mr. **ZORNISKY**, Mr. **DENTON**, Mr. **JOHNSTON**, Mr. **TRIBLE**, Mr. **D'AMATO**, Mr. **EAST**, Mr. **HELMS**, and Mr. **BOREN**) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 18 to limit the application of the exclusionary rule.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Exclusionary Rule Limitation Act of 1985".

SEC. 2. (a) Chapter 223 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3505. Limitation of the fourth amendment exclusionary rule

"Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be exclused in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.".

(b) The table of sections of such chapter is amended by adding at the end thereof the following item:

"3505. Limitation of the fourth amendment exclusionary rule.".

○

Senator McCONNELL. Senator Grassley is here, and I would like to call on him to see if he would be interested in making an opening statement. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I do not have an opening statement because I think statements I have made on this subject before speak for themselves, and we thought that we had the hearing process on this legislation over. I hope that this hearing that we have now will relieve any misapprehensions people have over whether or not there has been adequate information gotten in, and consider what that record is and then move to consideration of the bill which is on the agenda. I think that this is a very important piece of legislation, long overdue, and that we need to get on with some sort of a reasonable compromise that everybody can accept.

Senator McCONNELL. Thank you, Senator Grassley. Senator Denton, from Alabama, a distinguished member of our committee is chairing the Subcommittee on Security and Terrorism this morning, and as a result of that will be unable to attend this hearing. He has asked that I place in the record at this point an opening statement from him. Without objection, that will appear at this point.

[The statements of Senators Thurmond, Denton, Kennedy, and Grassley follow:]

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

The hearing today on S. 237 marks the third time in the last five years that the Committee or its Subcommittee on Criminal Law has held hearings to consider exclusionary rule legislation. We held four days of hearings in 1981 and four days in 1983 on S. 829, the Comprehensive Crime Control Act, which included an exclusionary rule bill. The Committee reported that bill, S. 1764, by a vote of 10-7, and the Senate passed the bill in the 98th Congress by a vote of 63-24. S. 237 is identical to S. 1764.

The wisdom of this legislation was confirmed last year by the Supreme Court in the *Leon* and *Sheppard* cases. The hearing today is for the purpose of reviewing S. 237 in light of those cases, as well as to hear from major proponents and opponents of the legislation. S. 237 would codify a federal exclusionary rule, thus recognizing the appropriate authority of Congress to make this important legal policy decision.

I wish to note that the *Leon* and *Sheppard* cases involved search warrants that were ultimately ruled to be invalid. The Court held that the exclusionary rule should not be applied to bar the use of evidence that was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, even though the warrant proves to be invalid.

S. 237 applies also to warrantless searches, but it does not undercut any Fourth Amendment guarantees. As I read the bill it is entirely consistent with the rule in the *Leon* and *Sheppard* cases. In fact, S. 237 may be even more stringent than the *Leon* rule because it requires both a subjective good faith belief by the officer and an objectively reasonable belief. The *Leon* rule appears to require only the latter. S. 237 in no way affects the Court's ruling on when search warrants are required. Warrantless search situations will still be the exception, not the norm. S. 237 simply states that in all searches in which the officer acts in an objectively reasonable good faith belief that his actions conform to the Fourth Amendment, the evidence should not be excluded on Fourth Amendment grounds.

I believe that this hearing will again demonstrate the need for exclusionary rule legislation and the soundness of the approach we have taken. I look forward to hearing from the fine witnesses today.

PREPARED STATEMENT OF SENATOR JEREMIAH DENTON

Mr. Chairman, I join in strong support of S. 237, a bill to modify the application of the Exclusionary Rule in Federal courts. I commend you for your leadership in introducing this necessary bill.

The bill would amend title 18 of the United States Code to allow otherwise admissible evidence to be used in Federal court proceedings, even if it was obtained through a violation of the fourth amendment to the Constitution, as long as the search or seizure which produced the evidence was "undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment. . . ."

The Supreme Court first held in the case of *Weeks* v. *United States* (1914) that evidence obtained in violation of the Fourth Amendment was inadmissible in a Federal criminal trial. Since its limited application in *Weeks* to exclude simple evidence of a crime, the exclusionary rule has been expanded to exclude contraband and the actual tools and instrumentalities of a crime. It has been further expanded to exclude evidence that was derived from other illegally seized evidence. Since the exclusionary rule is a judicially mandated rather than a constitutionally required response to fourth amendment violations, its reform through the legislative process is appropriate.

The primary, if not the sole, rationale for the application of the exclusionary rule is to deter fourth amendment violations by law enforcement personnel. The theory is that the exclusion of illegally seized evidence will deter law enforcement personnel from engaging in negligent or intentional practices that result in fourth amendment violations.

The problem arises when the rule is applied to exclude evidence seized in situations that a reasonably well-trained officer would not or could not have recognized as being in violation of the fourth amendment. The rule therefore loses any deterrent value it may have for more egregious violations of the fourth amendment. It simply results in a windfall for the criminal, who walks away unscathed despite the existence of reliable evidence of guilt.

If one considers the exclusion of evidence a "remedy" for one whose fourth amendment rights have been violated, then the problem is that it only rewards those who are actually guilty of a crime. It provides no recourse for innocent victims of police overaggressiveness, negligence, or intentional misconduct.

Mr. Chairman, in deciding when the exclusionary rule should be applied, the Supreme Court has balanced the deterrent effect of the rule against the cost to society that would result from the distortion of the judicial process caused by depriving the prosecution of reliable, probative evidence of guilt. The bill would make clear the congressional determination that whatever minimal deterrent effect that exclusionary rule may have is outweighed by its cost to society in cases where the evidence to be excluded is the product of a search or seizure undertaken in a reasonable and good faith belief that it was in conformity with the fourth amendment.

In the 1984 case of *United States* v. *Leon*, the Supreme Court upheld the use of evidence seized by officers acting in reasonable reliance on a search warrant, issued by a detached and neutral magistrate, that was later found to be invalid. The Supreme Court recognized in *Leon* that "indiscriminate application of the exclusionary rule—impeding the criminal justice system's truth finding function and allowing some guilty defendants to go free—may well generate disrespect for the law and the administration of justice." The bill introduced today incorporates the ruling of the Supreme Court that the exclusionary rule should be modified to permit the introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate. It also permits the use of evidence seized in warrantless searches where the seizing officer was acting in a reasonable and good faith belief that his conduct conformed with the fourth amendment.

The exclusionary rule will still be applied in cases where police conduct is objectively and patently unreasonable or where it is based on a warrant which was acquired through intentional and material misrepresentation. Thus, the effect of the bill is simply to limit the use of the exclusionary rule in those cases in which its cost to society is grossly disproportionate to the minimal deterrent effect it may have on law enforcement officers.

Mr. Chairman, legislation in the area is long overdue. I strongly urge my colleagues to support S. 237, as we did with the identical bill, S. 1764, last year, so that the 99th Congress will effect a needed modification of the exclusionary rule. Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Mr. Chairman, last year the Senate did some excellent work on effective anticrime legislation. It passed a landmark crime package by an overwhelming majority (91-1), containing a complete overhaul of criminal sentencing, bail reform, and many law enforcement improvements in the area of drug trafficking, criminal forfeiture, and prosecution of violent offenders.

The coalition of Democratic and Republicans, liberals and conservatives, which supported the crime package that was signed into law a year ago demonstrates that we can adopt significant anticrime legislation, without jeopardizing the constitutional rights or the civil liberties of any citizen.

In contrast to this meaningful anitcrime legislation, which I worked on for over a decade, is the bill to curtail the fourth amendment exclusionary rule, S. 237, which is the subject of today's hearings.

In the past I have opposed proposals to eliminate or limit the exclusionary rule because these proposals were not anticrime and they could have infringed constitutional rights and important civil liberties.

In particular, there is no evidence that relaxing the exclusionary rule is a practical step to take in the war against crime.

Studies show that in only between 1 and 2 percent of over thousands of criminal prosecutions examined was evidence excluded as the result of a fourth amendment violation. In less than one-half of 1 percent of the cases analysed in a GAO study was an exclusionary rule problem the primary reason for a prosecutorial decision not to bring a case. Simply put, the so-called reform in this legislaiton will not make any significant difference in reducing crime.

I have even greater reservations about the bill now before this committee.

First, we need to evaluate why congreessional action at this time is appropriate. The Supreme Court decisions in *United States* v. *Leon* and *Massachusetts* v. *Sheppard* created a limited "good faith" exception to the fourth amendment exclusionary rule in warrant cases.

The impact of these July 1984 decisions on police behavior and training practices is currently being studied by the Department of Justice, though the National Institute of Justice. I believe that the data from this study should be available to this committee so that it can evaluate whether any further modification of the exclusionary rule is appropriate.

Second, the Court has not extended the good faith exception recognized in *Leon* and *Sheppard* to any warrantless search situation. The difficult constitutional issues raised by extension of *Leon* to warrantless search suggests that deliberate consideration by the court of further refinement of *Leon* is preferable to sweeping statutory change.

Third, this bill is identical to the bill introduced in the 98th Congress before *Leon*. Its language has not been revised to reflect the requirements for warrent searches recognized by *Leon*.

In sum, exclusionary rule legislation which at best is an empty gesture appears to be particularly ill-conceived at this time.

I would hope today's hearing will address these concerns.

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman, I want to thank you for holding this hearing on S. 237, which modifies the exclusionary rule as it pertains to the fourth amendment.

It is unquestionable that the exclusionary rule is not a personal constitutional right, but one that was court-created as a sanction against a violation of the fourth amendment prohibition of unreasonable search and seizures.

Consequently, the exclusionary rule's purpose was to deter policy misconduct. However, when police have acted mistakenly, but in good faith, excluding seized evidence will not deter similar acts in the future. Exclusion of the evidence can, however, have a monumental adverse effect on the trial, and ultimately society.

Consequently, as Justice White once stated, "any rule. . . that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness."

Therefore, it is time to eliminate the abuses of the Rule. The Supreme Court, in its *Leon* decision, took a positive step in this direction by allowing a good faith reliance on a reasonable search warrant. S. 237 conforms with this decision, since searches and seizures would only be allowed if they are undertaken in a reasonable, good faith belief that the fourth amendment is complied with. Consequently, I support S. 237, and look forward to its passage. Thank you Mr. Chairman.

Senator McConnell. I am pleased to welcome our witnesses today, the first of whom is the Honorable Stephen S. Trott, who is Assistant Attorney General for the Criminal Division. Mr. Trott.

STATEMENT OF HON. STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. Trott. Thank you very much, Mr. Chairman and members of the committee.

I am very pleased to be here today to present the views of the Department of Justice, and of the administration, on legislation to modify the exclusionary rule.

As you know, the rule is a device through which a court excludes otherwise admissible probative evidence solely because it determines that the evidence was obtained improperly. As such, as the Supreme Court itself has remarked, the rule, quote, "deflects the truthfinding process and often frees the guilty."

Such a doctrine, when applied in such a way as to not produce any corresponding benefit for society, is intolerable. It hampers the police in honestly but aggressively seizing evidence of a crime, and worse, it destroys the respect of our citizens for the law and the judicial system.

This administration regards legislation to restrict the application of the exclusionary rule to those cases where there has been real police misconduct—as you pointed out in your opening statement, Mr. Chairman—as one of its most important goals in the criminal justice arena. When I was in law school over 20 years ago, studying the exclusionary rule was an abstract proposition. Parenthetically, of course it has been in effect in the Federal courts since 1914, and in California, since 1955. I believed that the rule was a great thing because I, as did you, Mr. Chairman, believe that the fourth amendment is truly the cornerstone of liberty in this country as we enjoy it.

But I have now been a prosecutor for 20 years, and sadly, I must tell you, that during those 20 years, I probably have, by application of the exclusionary rule, caused hundreds and hundreds and hundreds of cases, felony cases against criminals, not to be filed in our courts because an analysis of the manner in which the police gathered the evidence in those cases indicated that the case, although based on good-faith objective police work, would not survive the patchwork quilt of rules and regulations that defy the imaginations of the best lawyers in the country.

So I now have come, on the basis of 20 years of experience as a prosecutor, to the belief that the good-faith exception is long overdue.

In the last Congress, the Senate passed S. 1764, a bill that provided for a reasonable good-faith exception to the exclusionary rule by a vote of 63 to 24. A few months thereafter, the Supreme Court, in the cases of *Leon* and *Sheppard*, carved out such an exception for cases involving search warrants. The Court squarely held that the fourth amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by law enforcement officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant is ultimately found to be invalid.

Although the Supreme Court has now effectively laid to rest any real argument that the exclusionary rule is constitutionally required, the House did not see fit to enact S. 1764, or any other bill.

It is therefore necessary that the Senate again act to codify the *Leon* and *Sheppard* holdings, and, even more importantly, to extend their limitation on the rule to search and seizure cases where search warrants are not involved.

Although the argument\ was sometimes raised in the past that the rule was required by the fourth amendment, the Court made it increasingly clear that this was not the case.

That point was then nailed down by *Leon* and *Sheppard*, the Court indicating that this is "a judicially created remedy designed to protect fourth amendment rights."

Thus, the question, in essence, becomes, really, not one of law but of policy. The Court in *Leon* stated, as it had in a number of other recent cases, that the question of whether evidence should be excluded must be resolved by weighing the costs and benefits of preventing the use in evidence of inherently trustworthy tangible evidence. Therefore, the question we really have to ask is this: Does applying the exclusionary rule to keep out of evidence something that a court believes has been seized in violation of the fourth amendment's prohibition against unreasonable searches and seizures deter police misconduct? The answer of course depends on the situation.

If a law enforcement officer acts in an objectively reasonable belief that a particular search was proper, applying the rule to exclude the evidence he then seizes, could not possibly have any deterrent effect because there is no misconduct, and hence, nothing to deter.

And in fact, again, based on my experience of talking to police officers over 20 years under these circumstances, not only does it have no deterrent effect, but it produces a state of mind on the part of the police officers where they begin to wonder what is wrong with the law, and they actually develop a disrespect for the fourth amendment concept because it is applied so perniciously to their activities, that it produces no deterrence, and exactly the opposite effect from the effect intended.

So, in a number of ways, I think that the exclusionary rule, when applied to these circumstances, has been tremendously counterproductive of the respect for the law that it was intended to promote. Where an officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way, for it is painfully apparent that the officers are acting as a reasonable officer would, and should act under the circumstances. Excluding the evidence can in no way—in no way—affect his future conduct unless it is simply to make him less willing to do his duty, another problem that I have seen on many occasions.

I have had hundreds of police officers say to me, in effect, the hell with it; why don't we just flush the dope down the toilet next time instead of bothering to come over to this office and have you tell me all these rules and regulations that change from week to week, that we have no opportunity to follow, and it just results in everybody's waste of time.

We continue to try to recruit them in the other direction, but it is very, very difficult when you are dealing with honest police officers applying the law, and the courts destroy the good work that they put in.

If I can spend 1 second and then I will be finished, Mr. Chairman. The facts of the kinds of cases that we are talking about are rather dramatic in showing what we are talking about with the good faith exception.

These are the facts of an actual case in Colorado. On September 29, 1981, Darlene Bergen was outside her home in Denver sweeping the porch, a citizen living in a community. She saw a man walking on the opposite side of the street and observed him briefly peering into the front window of the house across from hers.

After observing him apparently looking into other windows at the same house, she saw him stop at another house, after which he disappeared from her view. The next saw him an hour later at a bus stop next to her house. He had taken off his shirt and was using it to cover a television set. He appeared nervous to Mrs. Bergen and she called the police.

For years, we have been asking citizens to do exactly what Mrs. Bergen did. She knew what she saw, and she did what she should have done: she called the police.

Officer Freeman, a 21-year police veteran was the first to respond to the dispatcher's report of a possible burglary suspect.

He asked the respondent for identification. The respondent had none. Other officers then arrived at the scene. They asked respondent various questions to which he responded that he had bought the television set from someone in the neighborhood for $100 and was taking it home.

He was wearing an undershirt and had wool gloves in his back pocket. Mrs. Bergen came outside and identified herself as the person who called the police, respondent was arrested and then searched. Under his shirt, police found the television set, a video game, $140 in cash, five rings, including two class rings bearing different initials, and women's jewelry.

Sometime later, they were able to track all of that property to burglaries in the neighborhood, and what happened to that case? The case was thrown out of court because it was held that Officer Freeman's conduct was illegal. This resulted in I think—I wonder what Mrs. Bergen thought when that happened.

Here is a woman living in a neighborhood. She calls the police, the police come—no decent citizen would do anything else—and the case gets kicked out. And the court felt well, there is no reasonable good faith exception, so that is just life in the big city.

These are unfortunately the facts of a case that was originally entitled *State of Colorado* v. *Quintero*. That is a case that made its way to the U.S. Supreme Court. Unfortunately, Mr. Quintero passed away before the case could be argued and it was mooted out.

But again, I keep harping back to my own experience. That is similar to the kinds of cases with which I have dealt over the years, where police officers performing good and decent police work then go into court, or into a district attorney's office, and find cases kicked out, and potential felons freed back into society.

We firmly believe that this is a good approach, it preserves the values in the fourth amendment, it will restore respect for the law that has been lost by decent citizens and especially police officers, and it in no way compromises the concept of liberty that we believe is important in this country.

Mr. Chairman, may the remainder of my statement be received in the record, and I will be happy to answer questions.

Senator McConnell. It will be inserted at the appropriate place.

[The statement follows:]

Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Mr. Chairman and Members of the Committee, I am pleased to ~~be here~~ today to present the views of the Department of Justice and of the Administration on legislation to modify the exclusionary rule. As you know, the exclusionary rule is a device through which a court excludes otherwise admissible probative evidence solely because it determines that the evidence was obtained improperly. As such, as the Supreme Court itself has remarked, the rule "deflects the truthfinding process and often frees the guilty." [1] Such a doctrine, when applied in such a way as not to produce any corresponding benefit for society, is intolerable. It hampers the police in honestly but aggressively seizing evidence of crime, and worse, it destroys the respect of our citizens for the law and the judicial system. This Administration regards legislation to restrict the application of the exclusionary rule to those cases where there has been real police misconduct as one of its most important goals in the criminal justice area.

Mr. Chairman, almost four years ago, on October 5, 1981, D. Lowell Jensen, my predecessor as head of the Criminal Division, had the privilege of appearing before the Subcommittee on Criminal Law to suggest legislation to provide that otherwise admissible evidence should not be excluded on the grounds that its seizure violated the Fourth Amendment if the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with that amendment. A lot has happened since then.

In the last Congress, the Senate passed S. 1764, a bill that provided for a reasonable, good faith exception to the exclusionary rule by a vote of 63 to 24 on February 7, 1984. A few months thereafter the Supreme Court in the Leon and Sheppard cases [2] in effect carved out such an exception for cases involving search warrants. The Court squarely held that the Fourth Amendment exclusionary rule should not be applied so as to bar the use of evidence obtained by law enforcement officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant is ultimately found to be invalid.

Although the Supreme Court has now effectively laid to rest any real argument that the exclusionary rule is constitutionally required, the House did not see fit to enact S. 1764 or any other exclusionary rule bill. It is therefore necessary that the Senate act again to codify the Leon and Sheppard holdings, and, even more important, to extend their limitation on the rule to search and seizure cases where search warrants are not involved. I will also suggest that the Congress should act to forbid courts from acting on their own volition and applying the exclusionary rule in contexts other than the Fourth Amendment.

Mr. Chairman, in the last Congress, the Committee produced an excellent report on S. 1764 which discussed the origin and development of the exclusionary rule in some detail. [3] In light of that report, I will not go into the history of the rule in any great detail. But it must be remembered that the rule is merely a judicially created one. It is not set out anywhere in the Constitution or the Bill of Rights. It was not even stated by the Supreme Court until 1914 -- well over a century after the Constitution was adopted -- in Weeks v. United States. [4]

Although the argument was sometimes raised in the past that the exclusionary rule was required by the Fourth Amendment, in the ten or twelve years before Leon and Sheppard, the Court made it increasingly clear that this was not the case. Leon and Sheppard then nailed down the point that the rule was not constitutionally mandated. Rather, the Court characterized it as "a judicially created remedy designed to safeguard Fourth Amendment

Rights generally through its deterrent effect, rather than a personal right of the person aggrieved." 5/

Thus, the question becomes one not of law but of policy. The Court in Leon stated -- as it had in a number of other recent cases -- that the question of whether evidence should be excluded must be resolved by weighing the costs and benefits of preventing the use in evidence of inherently trustworthy tangible evidence. Let's think for a minute about who benefits when the rule is applied and evidence is excluded. Pretty clearly, the defendant benefits because the jury never gets to see or hear about the very evidence that would in most cases prove his guilt -- the bag of cocaine, the gun used to murder a law enforcement officer, or the satchel of top secret documents destined for a Russian KGB agent. Just as clearly, society loses in a case such as this when a guilty person is returned to the streets, unless, somehow, excluding the evidence and freeing the criminal serves some even more important purpose like deterring misconduct on the part of the police.

Therefore, the question we have to ask is this: Does applying the exclusionary rule to keep out of evidence something that a court believes has been seized in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures deter police misconduct? The answer, of course, depends on the situation. If a law enforcement officer acts in an objectively reasonable belief that a particular search was proper, applying the rule to exclude the evidence he then seizes could not possibly have any deterrent effect because there is no misconduct and hence nothing to deter. I might also add that applying the rule in such a case results in attaching a false label of "police misconduct" to what is, in fact, proper and commendable police conduct. This adversely affects the whole criminal justice system by fostering the public's perception that the police have engaged in lawless conduct when this is simply not the case.

As the Court in Leon summed it up: "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act under the circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty...'"

While Leon was, as you know, limited to cases involving search warrants, its reasoning applies equally strongly in and should be extended to warrantless searches as well. Applying the exclusionary rule in cases in which a law enforcement officer has acted in a reasonable belief that a particular type of search -- typically a search incident to an arrest or a search of an automobile -- could be conducted without a warrant and was otherwise proper cannot possibly have any deterrent effect on misconduct because, by definition, there is no misconduct. What is really involved when such a search is ruled in violation of the Fourth Amendment is a determination by a court, usually years after the officer's confrontation with the criminal, that his actions did not quite comport with the requirements of the law of search and seizure as it has been developed by thousands of appellate court decisions over the years. To exclude such evidence because a court finds the officer should have acted differently, even though it also finds he acted reasonably, can have but one result: the unjustifiable acquittal of a guilty defendant.

An acquittal in a case such as this is simply too high a price for society to pay. It is the elimination of this result that we seek to end by our legislation. It is important to keep this goal in mind because I know that certain groups have claimed that our proposals to restrict the application of the exclusionary rule would encourage police misconduct. That is simply not the case. We do not intend to use illegal methods to combat crime, but at the same time we cannot tolerate the freeing of guilty criminals without a valid reason.

Turning now to S. 237, this bill is identical to S. 1764 which the Senate passed in the last Congress before the Leon and Sheppard cases were decided. As you know, S. 1764 was drafted and strongly supported by the Department. Nevertheless, we would propose one minor amendment in light of the Leon case. S. 237 states that evidence will not be excluded on the grounds that the search or seizure was in violation of the Fourth Amendment if the search or seizure was undertaken in a "reasonable, good faith" belief that it was in conformity with that Amendment. The Committee's report on S. 1764 explained that this required that the conduct be found both objectively and subjectively to have been undertaken in good faith. [7/] But in Leon, the Supreme Court determined that it was preferable and sufficient to rely solely on the concept of objective reasonableness and not try to plumb the officer's subjective belief in the legality of his actions. We agree and thus recommend that the phrase in the bill "a reasonable good faith belief" be replaced with the phrase "an objectively reasonable belief."

In addition, we think that legislation limiting the exclusionary rule should extend beyond just its application in the context of the Fourth Amendment. In contrast to its extensive consideration of the rule in cases involving the constitutional requirements of the Fourth Amendment, the Supreme Court has never given in depth consideration to whether evidence should be excluded if it was obtained in violation of a statute, rule, or regulation. However, the Court has held that suppression of evidence is not required for every statutory violation, even when the statute contains an exclusionary rule, and has declined to adopt an exclusionary rule for evidence obtained by an agency in violation of its own internal guidelines. [8/]

On the other hand, some lower courts have invoked the exclusionary rule for non-constitutional violations, although the Second Circuit has cautioned that "courts should be wary in extending the exclusionary rule ... to violations which are not of constitutional magnitude." [9/] Moreover, Rule 402 of the Federal Rules of Evidence, enacted in 1975, states: "All relevant evidence is admissible, except as provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Arguably, this would prevent the application of the exclusionary rule for a non-constitutional violation, although no court appears to have considered Rule 402 in this light.

In any event, given the heavy price in terms of the truth finding process exacted by an exclusionary rule, coupled with the Supreme Court's holding that the rule is not required even for constitutional errors, we think it is important for Congress to legislate the principle that when the underlying violation is not of constitutional magnitude, the exclusionary rule ought not to be invoked by a court unless a statute indicates that it should be so applied. Accordingly, we recommend that a new section be added to title 18 specifically stating that except as provided by statute or rule of procedure, evidence which is otherwise admissible shall not be excluded or suppressed in a federal court proceeding on the ground that the evidence was obtained in violation of a statute, rule, or regulation.

If the Committee decides to adopt this proposal for limiting the exclusionary rule's application in non-constitutional situations, the limitation of the rule for constitutional violations, as set out in S. 237 needs to be modified by eliminating any reference to statutory authorization for the exclusion of evidence. For the sake of clarity, I have attached as a one-page appendix to this statement new sections 3508 and 3509 to reflect these changes. 10/ We urge the Committee to modify S. 237 so as to set out both of these new sections.

In sum, let me emphasize again that legislatively limiting the exclusionary rule so as to prevent its abusive application is critically important. Federal law enforcement efforts should not be hampered by an evidentiary rule that can operate to turn loose hoodlums and spies who belong in jail. Moreover, limiting the exclusionary rule would have the desirable affect of encouraging more of the states to do the same. Finally, limiting the rule would send a message to the law enforcement community and the public that the Congress will not stand idly by while courts throw out evidence by second-guessing the actions taken by reasonable police officers in obtaining it -- actions often taken during a sudden, dangerous confrontation with a criminal.

§ 3508. Limitation of the fourth amendment exclusionary rule

Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the fourth amendment. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable belief, unless the warrant was obtained through intentional and material misrepresentation.

§3509. General limitation of the exclusionary rule

Except as specifically provided by statute or rule of procedure, evidence which is otherwise admissible shall not be excluded or suppressed in a proceeding in a court of the United States on the ground that the evidence was obtained in violation of a statute or rule of procedure, or of a regulation issued pursuant thereto.

FOOTNOTES

1/ Stone v. Powell, 428 U.S. 465, 490 (1976).

2/ United States v. Leon, ___U.S.___, No. 82-1771 (July 5, 1984); Massachusetts v. Sheppard ___U.S.___, No. 82-963 (July 5, 1984).

3/ Report No. 98-350, 98th Cong., 2d Sess.

4/ 232 U.S. 383 (1914).

5/ Leon, slip op., p. 7.

6/ Leon, slip op., pp 20-21.

7/ Fn. 3, supra, p. 21.

8/ See United States v. Donovan, 429 U.S. 413, 432-434 (1977), and United States v. Caceres, 440 U.S. 741, 754-757 (1979).

9/ See United States v. Burke, 517 F. 2d 377, 386 (2d Cir. 1975). Our report on S. 237 dated August 20, 1985, discusses these cases and the entire question of eliminating the exclusionary rule for non-constitutional violations in greater detail.

10/ We note that any new sections added should start with 3508, not 3505 as is set out in S. 237. Sections 3505-3507, dealing with foreign evidence, were added by the Comprehensive Crime Control Act of 1984.

Senator McConnell. I notice that the Senator from Ohio and the Senator from Arizona have joined us. Senator Metzenbaum, do you have an opening statement?

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator Metzenbaum. I appreciate your holding the hearings on this bill as well as the other criminal law bills that are before the committee. It is particularly important that we hear testimony on this issue of changing the exclusionary rule. It should be pointed out, as we all know, that the recent Supreme Court decisions in this area, really zero in on the question. I do not know why we need to go further. When you have an amendment, or proposal, and you say that the search was undertaken in a reasonable good faith belief that it was in conformity with the fourth amendment, I would like to give a test to all the police officers of this country on the fourth amendment.

I think that proposed is really calling upon them to have a knowledge they don't have. I am not so sure that the mayors, or the chiefs of police, or anybody, would be in a position to speak to that, determine whether a search is in conformity with the fourth amendment.

Let us not kid ourselves: The Founding Fathers adopted the amendment because of the practices of unwarranted searches of these homes. Now, as our witness points out, you can always make out an egregious case in order to make a point, but sometimes, you have to look at the overall good, the overall value of our constitutional protections. I remember very well, many years ago, when the Kefauver committee was conducting hearings, and so many alleged criminals were taking the fifth. There was a big move on at that time to amend the Constitution to eliminate the fifth amendment.

Well, it was not eliminated and it has been very difficult to cause changes to be brought about in connection with the Constitution; but I seriously question whether or not this proposed legislation is itself constitutional.

And although I respect those who are making this effort to move forward with this bill, my own best judgment tells me that it is not in the Nation's best interest to do so at the moment. I think that there may be the votes, because it did pass the Senate previously. But it did not pass with my support at that time, and I do not think will have my support at this time. However, I would guess that if the matter is brought to the floor, it still might have the necessary votes.

That does not make it right, and I would respect my colleagues' right to be wrong, if they see fit to pass it in this instance.

Senator McConnell. Thanks, Senator Metzenbaum. Senator DeConcini.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeConcini. Mr. Chairman, thank you. I support S. 237 which amends title 18 of the United States Code, by adding the new section, 3505 to chapter 223. The bill before us provides that evidence obtained as a result of a search and seizure, and which is otherwise admissible, shall not be excluded in a proceedings in a court of the United States, if the search and seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment.

The exclusionary rule is a judicially created rule under which evidence is barred from introduction at a proceeding such as a criminal trial, if the evidence is determined to have been obtained as a result of a search or seizure that violated the first clause of the fourth amendment.

The rule is of comparatively recent vintage and was not even applied by the Supreme Court in the context of the fourth amendment until 1914, 123 years after the the fourth amendment was adopted.

Mr. Chairman, I have a full statement that I would ask to put in the record. Let me just add to that statement, that having been a prosecutor, I have witnessed the so-called egregious cases that the Senator from Ohio talked about, and these are cases against all society. When a criminal is totally relieved of the entire evidence against him and ultimately does not have to answer for the crimes that he might have been involved in, to me, all of society pays. This is a carefully drafted amendment which does not deprive people of their fourth amendment rights but gives some direction to the Court, as the Court has given to the Congress, to make amendments and alterations of this rule.

So, Mr. Chairman, thank you for allowing me to be here and I ask that my full statement be put in the record.

Senator McConnell. Without objection, that will be done at this point.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman, I support S. 237, a bill that amends title 18 of the United States Code by adding a new section 3505, to chapter 223 to limit the application of the fourth amendment exclusionary rule in Federal court proceedings. The bill will provide that evidence obtained as a result of a search and seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search and seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment.

The exclusionary rule is a judicially created rule under which evidence is barred from introduction at a proceeding such as a criminal trial if the evidence is determined to have been obtained as a result of a search or seizure that violated the first clause of the fourth amendment. The rule is of comparatively recent vintage and was not even applied by the Supreme Court in the context of the fourth amendment until 1914, 123 years after the fourth amendment was adopted; it has only been held applicable to State criminal proceedings for the past 22 years.

There are no constitutional or statutory provisions which specifically set limits on what is meant by an "unreasonable" search or seizure. Instead the law in this area is an amalgam of cases dealing with a vast range of issues relating to the undertaking of searches and seizures. Yet courts continue to apply the rule even as they continue to develop the law of search and seizures. The heart of the present problem in application of the rule is that it has been expanded gradually by the courts to apply in situations in which the rule cannot possibly serve its primary purpose of deterring police misconduct. In my experience as a former prosecutor, I have seen this distortion of the rule's purpose result in grave injustice as well as a substantial cost to our society as law enforcement officers and private citizens alike have lost faith in our criminal justice system. I have seen, as the Supreme Court has stated, that the rule "deflects the truthfinding process and often frees the guilty."

This bill is intended to enhance the operation of the Federal criminal justice system by allowing courts greater access to all reliable evidence relevant in determining the guilt or innocence of the defendant, and to promote renewed respect for that system as a search for the truth in the minds of our citizens. It is intended to aid the courts in that search for the truth and in criminal cases, where the police have reasonably tried to apply the complex law of search and seizure, insure that the guilty are convicted and the innocent are acquitted.

This bill will not eliminate the exclusionary rule. Rather it will eliminate the disproportionate application of the rule, and the disrespect for the law that application engenders. We must allow the courts to grant a remedy for the violation of Fourth Amendment rights which matches the seriousness of the violation while still deterring willful or negligent police misconduct.

For these reasons, I urge my colleagues who are concerned about crime in America, and the perception people have of our legal justice system, to support this bill.

Senator **McConnell**. I see that our distinguished ranking member of the committee has joined us. Senator Biden, do you have an opening statement?

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator **Biden**. Yes; I do. I thank the Chair and my colleagues for their indulgence in hearing me in light of the fact that I am late.

Mr. Chairman, no one who has worked in law enforcement or the court system, as most members of this committee have, and as the distinguished chairman of the full committee has, can be satisfied with the state of search and seizure laws to this day.

The fourth amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

In 1914, the Supreme Court, in *United States* v. *Weeks,* decided the obvious: That the fourth amendment is not self-enforcing, that some mechanism is needed to give life to the provision.

The Court's response to this situation was to create the so-called exclusionary rule. The rule has been much criticized over the last 70 years, and as Justice Cardozo put it: It makes no sense to free an obviously guilty person charged with a serious crime because, "the constable has blundered."

Mr. Chairman, it is easy to criticize the exclusionary rule, but we must not allow such criticism to blind us to the fact that we must have an effective mechanism for enforcing the fourth amendment.

Chief Justice Burger pleaded with the Congress in the early 1970's, in the *Bivens* case, to develop an amendment to the Federal torts claims statute to create a more effective civil remedy against the Federal Government for law enforcement abuses, so that it might serve as an alternative to the exclusionary rule.

I believe that only after we enact tort claims legislation and have had an opportunity to see how it works in action, should we consider significant reform of the exclusionary rule.

That is the first reason that I think it is premature to move on the exclusionary rule bill at this time. The second reason is, as we all know, last year the Supreme Court created a good faith exception to the exclusionary rule with regard to cases where the warrant is issued.

Most legal scholars who have examined closely the language of the Court's decision and have looked at the direction in which the

Court is heading, have concluded that the Court will extend the good faith defense to cases in which a warrant is not used.

By not acting on tort claims legislation, I think we make it unlikely for the Court to act because they will be reluctant to make such significant modifications to the exclusionary rule without there being another mechanism for enforcing the fourth amendment.

Mr. Chairman, in conclusion, I think that the step that needs to be taken now is not to enact the exclusionary rule, a rule that has served us well, and which, in my judgment is responsible, more responsible than any other single factor for the high standard of police behavior in this country, but to enact the tort claims legislation.

I hope this committee will agree and I hope that my colleagues will look at S. 492, the bill that I have introduced, the Tort Claim Act, as an alternative.

One last comment I should make, Mr. Chairman. The Justice Department, as I understand it, has a study that is under way on the effects of the Court's decision on the exclusionary rule, and there are a number of outstanding questions relating to the impact of the Court's two decisions in the *Sheppard* case and the *Leon* case, that I think warrant us slowing down just a little bit and taking a look at the Justice Department's study that I understand is under way, and will not be done for some time, and moving expeditiously to deal with the Tort Claims Act. I thank the Chair for his indulgence and I anxiously await the testimony of the witnesses who both propose significant change, and those who argue against any change. Thank you, Mr. Chairman.

Senator McConnell. Thanks, Senator Biden. Mr. Trott, S. 237 seems to set up a rebuttal presumption of good faith in law enforcement, unless there is evidence that the police acted to intentionally misrepresent the facts in obtaining a warrant.

Does this approach create the potential for abuse, that might outweigh the benefits of the modification?

Mr. Trott. Mr. Chairman, I do not believe so. I think this is a relatively simple test that the judges of the Nation will be able to cope with. Each situation will be approached as the situation is.

There will be opportunity for cross examination of the officers, and for an examination as to whether there is an objective good faith belief in the constitutional cleanliness of the conduct.

I do not really think it sets up a presumption; it just presents the issues squarely to a judge for decision.

Senator McConnell. The Supreme Court, as several Senators have mentioned, has recently issued two decisions in the field of search and seizure that set up good faith exceptions for evidence that was obtained through a defective warrant. Why should the Congress interfere in this area of the law which is evolving on its own?

Mr. Trott. Well, No. 1, I think the evolution has been quite slow, but No. 2, I do believe that Congress has a direct stake in this, and an interest in remedying a situation that still cries out for change.

This is the type of issue that was addressed last year, and as I pointed out before, the Senate really overwhelmingly decided that this was in the best interests of law enforcement in the United States.

Senator McConnell. Senator Biden.

Senator Biden. Thank you. Mr. Trott, as I indicated in my opening statement, it is my understanding, in part based upon the American Bar Association's written statement, that the Department of Justice through the National Institute of Justice, now has a major study under way looking at the impact of last year's *Leon* case in which the Court created the good faith exception to the exclusionary rule for searches in which a warrant is used.

The ABA says the purpose of the study is to look at the impact of *Leon* on police behavior and training practices. Is such a study being conducted, and what is your understanding of the purpose? And if there is such a study, when do you anticipate it will be completed?

Mr. Trott. Mr. Chairman, I am not completely up to date on that. I would be delighted to respond to your questions in great detail, in writing, just as soon as we possibly can.

[The information follows:].

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

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Honorable Joseph R. Biden, Jr.
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Biden:

At the October 2, 1985 hearing on the exclusionary rule, you inquired about a study of the effects of the Leon case being conducted by the National Institute of Justice (NIJ). I have been informed by the NIJ that shortly after Leon was decided, Deputy Attorney General D. Lowell Jensen suggested that an effort be made to determine the effect of that decision on police practices. As a result, the NIJ made a grant of $148,414 to the Police Executive Research Forum in Washington, D.C. to examine the effects of Leon on police search warrant practices.

The project has three specific purposes: to learn whether and in what ways the Leon decision has changed the search warrant process; to determine the extent, nature, rationale and trends in regulations of the search warrant process imposed by the state supreme courts; and to locate especially constructive police administrative procedures relevant to the search warrant process.

The initial data for the survey was gathered by telephone interviews of police and prosecutors in a sample of thirty metropolitan areas throughout the country. Subsequently, site visits were conducted at seven cities whose search warrant procedures had been documented in a 1984 report written under an NIJ grant to the National Center for State Courts. An analysis of the data is now underway and a draft report is expected in February of 1986. It is anticipated that in addition to a comprehensive final report, the research will result in a 25-50 page summary of the study's findings for practitioners and an article length summary for a law journal.

During the hearing you also suggested that amending the Federal Tort Claims Act (FTCA) should take precedence over efforts to limit the exclusionary rule and you asked for our views on this issue. As you know, amending the FTCA to allow persons who are subjected to unlawful searches or seizures to sue the government for money damages has been frequently suggested as an alternative to the exclusionary rule. In fact, the Chief Justice's dissent in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 422-424 (1971), suggested just such an approach. During the past several years, however, the Department has been of the view that providing a reasonable, good faith exception to the exclusionary rule was the most effective way of limiting the rule to its proper function of deterring police misconduct and that the question of amending the FTCA should be considered separately from the exclusionary rule. In essence, the Supreme Court's adoption of a reasonable good faith exception to the exclusionary rule for warrant cases in Leon and Sheppard supports this position. We think it is now clear that it is not necessary to amend the FTCA to provide an alternative remedy to the exclusionary rule for victims of unlawful searches or seizures.

Nevertheless, as you are aware, for reasons unrelated to the exclusionary rule, the Department has long sought amendments of the FTCA to immunize federal employees from civil liability for constitutional torts committed while in the performance of their duties and to make the United States, not the individual employee, the sole defendant in such cases. Questions have arisen as to whether amendments of the FTCA to achieve these results should apply just to law enforcement and investigative officers or should extend to all federal employees. Moreover, there is the question of the extent to which the reasonable good faith of the federal employee who committed the alleged tort should be available as a defense to the United States if it is substituted as the defendant. I note that your bill on this subject in the present Congress, S. 492, raises these issues. The Department is preparing a report on that bill for the Judiciary Committee at the present time and we hope to finish this task shortly. Meanwhile, as I indicated, we think that the consideration of legislation limiting the exclusionary rule should proceed independently of the FTCA amendments.

You will probably recall that during the hearing we discussed that portion of the Leon majority opinion in which the Court stated that exclusion of evidence would still be appropriate in certain situations. Specifically, at page 28 of the slip opinion, Justice White noted that the exclusionary rule might be applied if the judicial officer who issued the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; if the warrant was issued by a judicial officer who abandoned his judicial role (such as by personally taking part in the search) so that he could not be considered neutral and detached; if the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or if the warrant was so facially deficient (such as by failing to particularize the place to be searched or the things to be seized) that the executing officers could not reasonably presume it to be valid.

You inquired if these four "telltale" signs of bad faith should be incorporated in a statute imposing a reasonable good faith exception to the exclusionary rule. In effect, the first and the last of these indicia of bad faith, the supplying of false information and relying on a warrant so facially deficient that it provides no direction where to search or what to seize, would be covered in the final sentence of the legislation we have proposed. (As I indicated in my statement, we favor modifying S. 237 slightly to comport with Leon and rely solely on the objective reasonableness of the officer's actions so that the final sentence would read: "A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable belief [that the search was in conformity with the Fourth Amendment], unless the warrant was obtained through intentional and material misrepresentation.") Clearly, supplying false information in the affidavit would destroy the presumption that the search was proper, and a search conducted pursuant to a warrant that gave no direction as to where to search or what to seize would in essence have no scope, thus also destroying the presumptive validity of searches conducted pursuant to warrants.

Similarly, our suggested revision of S. 237 already includes the third instance mentioned by the Court where the reasonable good faith exception to the rule would not apply, the situation where an officer relies on a warrant based on an affidavit so deficient in showing probable cause as to make the reliance unreasonable. As you know, we favor language stating that evidence would not be excluded on Fourth Amendment grounds "if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the Fourth Amendment." While searches pursuant to warrants would be presumptively valid, the presumption would quickly disappear in a case in which the affidavit to support it showed no indication of probable cause worthy of official belief.

Finally, it would be extremely difficult to codify the concept that no exception to the exclusionary rule should be made based on reasonable good faith where the judicial officer departs from his neutral and detached role. While we agree that applying the exclusionary rule in such a case of judicial misconduct makes more sense than in cases of alleged police misconduct, we think that the instances of magistrates departing so completely from their proper role as to justify the application of the exclusionary rule would be so few and yet so obvious that the courts could adequately apply the rule in such situations without legislative guidance. For example, in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), the case that Justice White cited as an example of a magistrate's total departure from his proper role, the magistrate actually took part in the search and ordered the seizure of hundreds of items for which he had not previously found probable cause to seize when he issued the warrant.

I hope that the above has been responsive to your questions and that the Committee will quickly give favorable consideration to this important area of providing reasonable limitations on the exclusionary rule.

Sincerely,

/s/ STEPHEN S. TROTT

Stephen S. Trott
Assistant Attorney General
Criminal Division

cc: Honorable Strom Thurmond
Chairman, Committee on
the Judiciary
United States Senate

Senator BIDEN. That would be very helpful. I would appreciate it. A followup question that I have is that Justice Blackmun made the following statement in the concurring opinion in the *Leon* case, and I quote:

> If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the fourth amendment, we shall have to reconsider what we have undertaken here.

Do you agree with the Justice's statement, if the effect of either the *Leon* case and/or of this legislation passes?

Mr. TROTT. Senator, I think the *Leon* and *Sheppard* cases were decided 2 or 3 days before I was to address the National District Attorneys Association training conference in Houston, Texas.

I was going to talk about some innocuous subject when *Leon* and *Sheppard* were decided. I tore up my speech and I wrote a new speech on *Leon* and *Sheppard*, and as a matter of fact, the key element of my speech was to quote the exact language that you just read from Justice Blackmun's observations, and I pointed out to the prosecutors who were there, in a career prosecutor training course, that the responsibility for making sure that the fourth amendment was protected, and that this new exception was handled with responsibility, fell on our shoulders. And I said each prosecutor, and each police officer in the United States ought to make it a part of his and her own personal agenda, to make sure that Justice Blackmun's concerns never come true, and that we are able to demonstrate, with objectivity, that we have lived up to what I call the challenge of the good faith exception to the exclusionary rule, to prove that we can do what we have said we can do, and that is, guard the fourth amendment, and at the same time vigorously pursue crime. I would be delighted to send you a copy of this.

It is my view, after talking to the U.S. attorneys, that we have lived up to that challenge thus far, and that the results during the last 1½ years of *Leon* and *Sheppard* have been quite positive.

The fourth amendment continues to be respected. This was a good step in the right direction. Law enforcement and prosecutors have shown that they can live up to these exhortations, and we are quite confident that we will continue to do so.

Senator **Biden**. I am not being solicitous, when I suggest that I have no doubt about the good faith of the vast majority of the law enforcement agencies in this country, and the Department of Justice in particular, but my specific question is, that if, in fact, it were shown that it did impact negatively upon the conduct and performance of police agencies in this country, do you believe that we should then go back and attempt to legislatively remedy that?

Mr. **Trott**. Well, as a rhetorical answer to your question, the answer certainly would have to be yes. If somehow this produces chaos, and the fourth amendment becomes ignored, and police agencies all over the country, or even in certain areas, start running around abusing the dickens out of the fourth amendment, I would be the first one to call for some tightening up of the process.

But I see it just the other way. This is a situation where the responsibility is placed where the authority is for carrying out these decisions, and the response that I have seen, nationally, is the same response I tried to describe for you earlier: Law enforcement all over the country saying, it is now on us to do this right. If anything, it is spurring agencies on to make sure that their police officers are trained well enough to qualify for these new exceptions that are out there. So, I am——

Senator **Biden**. I am not disagreeing with that. The only point I am trying to make is, if we go back and look at the exceptions of those things which warrant my discomfiture with the exclusionary rule over the last 70 years, and the Justice Department's more acute discomfiture with the exclusionary rule, it might be argued that it is a fairly small body of cases that are in fact involved.

Let me put it this way: Do you believe that the existence of an exclusionary rule has had a dramatic impact upon the administration of justice in this country?

Mr. **Trott**. A dramatic impact, yes; not all positive.

Senator **Biden**. That is what I mean. A dramatic negative impact?

Mr. **Trott**. I believe that it has. On balance, I think the negatives far outweigh the positive aspects of this, and with apologies to the chairman for repeating what I said before: I have been a prosecutor for 20 years. I have released hundreds and hundreds and hundreds of felons, talking to police officers, trying to explain why what they did, although they thought it was objectively reasonable at the time, failed to take into consideration a new case here and a new case there, that changed the rules in midstream, about which they were completely unaware.

Senator **Biden**. I was only involved in the criminal justice system for 4 years, and I was on the other side of it, and you must have dealt with a bunch of shoddy officers if you had—you are telling me you have had hundreds and hundreds of cases——

Mr. TROTT. Oh, yes, and let me give you an example how. In California, a lot of arrests involve impounding automobiles that are being used by criminals, and the rule for a long period of time was, when you arrest somebody and impound an automobile in connection with that arrest, you may inventory that car, and take everything that is in the car out of it, and list it. And if in the process of running an inventory, you discover a gun, narcotics, stolen property, all of that can be used against whomever. It is not an illegal search and seizure to inventory a car.

All of a sudden, out of the blue, the California Supreme Court decided in the case of the *People* v. *Mazzeti*, that it was an illegal search and seizure. Instead they should just lock the car.

I had rafts and rafts and rafts of cases coming in for 6 months where police officers had impounded cars, listed things and then made cases, and, all of a sudden, because they changed the rules, out they went.

And the police officers looked at me and said what kind of nonsense is this? I said sorry, they apply this stuff retroactively and now we are in court, the rules shift. Over and over again that occurs.

Now, it takes a long time for police officers to catch up. Finally, 6 months later, then they caught up, and they say, OK, well, the new rule is you have got to lock the car; fine and dandy.

But then we went through a series of cases where, if you recovered a stolen car, the theory was, oh, you could search a stolen car because the crook driving it had no privacy interest in the car. Then the California Supreme Court came down with the *Dallas* case, and found a right of privacy in a stolen vehicle, suppressing sawed-off shotguns, drugs, and other weapons, and we had a whole raft of cases following that where police officers, in reliance on what they thought the law was in the past, found themselves caught short and their cases were going out the window.

We had another series of cases where it said, well, if you arrest somebody carrying a briefcase, you can search the briefcase. They all knew that and they all did.

The California Supreme Court came down and changed that, so then you had all these searches that went out the window. Then you had a series of cases on whether or not you could search a suitcase, whether or not you could search a Jack-In-The-Box cup, whether or not you can search a lunchbag, and the police officers ended up throwing up their arms, and most of them simply telling me: "Look. I'm going to do what I think is right and if you clowns want to throw it out, that's your problem, not mine."

This is the kind of disrespect that was promoted for the fourth amendment. I found hundreds and hundreds of decent men and women who are police officers in this country trying their best to do the right thing fighting crime, time and time again running into situations where judges, apologetically to the police officers, in my presence said, "I'm sorry, we're going to have to suppress the evidence in this case, officer. I know you didn't understand the change in the rule and I know you thought you were doing the right thing, but there's a technical rule that you weren't aware of, that requires me to find this to be an illegal search and seizure."

And the officers are not deterred from anything. They go out of the room thinking, this is silly stuff. I think the objective good-faith exception to the exclusionary rule permits no heavyhanded rogue police conduct.

It enables every judge in every courtroom in the United States to spot that type of nonsense behavior and to exclude the evidence, and it also enables every prosecutor to refuse to bring cases behind that kind of contaminated evidence.

But it also enables us to recognize that these are judgments being made in very complex areas, and that the purpose of the rule is to deter police misconduct.

You are deterring nothing, if you are telling an objectively reasonable police officer that what he did was wrong, even though he thought it was right.

Senator **Biden**. Well, it seems to me that for the series of examples that you have cited—and in part I think you would acknowledge and admit that one of your problems is you are from California.

Mr. **Trott**. I cannot deny that.

Senator **Biden**. I think that if you go back and look at the 70-year history of the exclusionary rule, what impact it has had on police conduct has been, by and large, extremely positive.

If you look at the way in which law enforcement officers behave in many of the States, my own included, and the State of California, I suspect, prior to the imposition of the exclusionary rule, or the enunciation of the exclusionary rule, I would doubt whether or not you would suggest it did not have a positive impact.

Mr. **Trott**. Senator, I would agree with you that the exclusionary rule, as such, has had a positive impact. It has caused training programs, it has caused a lot of good things to happen, but that aspect of the exclusionary rule that has been pernicious and arbitrary, has held back some of the progress that we might otherwise have made, and that is why I think we are getting rid of one part of the exclusionary rule by pursuing a good-faith exception, that cuts against the direction in which we all want to go, which is to continue to promote and preserve the values that are inherent in the fourth amendment.

Because this is the part of it that penalizes a decent police officer and causes that officer to have real confusion as to what he is doing.

Senator **Biden**. Well, let me ask you whether or not the good faith exception should prevail, if the magistrate who issued the warrant was not neutral.

Mr. **Trott**. No. I think the *Leon* and the *Sheppard* cases make it clear, that if you are going to a rubberstamp magistrate because you just want to skirt the whole issue, that should be thrown out; it should not be allowed to happen.

Senator **Biden**. Should we write that into the law?

Mr. **Trott**. Well, I think the legislative history would certainly include something like that, but I think the test itself that we are establishing, and *Leon* itself, which covers the warrant situation, makes it pretty clear that that is already the case.

Senator **Biden**. Well, the question that I have—let me ask you this, then. Is it the Justice Department's position that the four exceptions were not advisory but they were a constitutional requirement being dictated by the Supreme Court?

Mr. TROTT. Well, I am not quite exactly sure how to answer that. Whatever they are, they contain values that ought to be promoted, either continuously in the court decisions or in the legislation.

Senator BIDEN. Well, see, that is my problem. My problem is that if in fact it is ruled by a later court, that they were merely advisory, or dicta in the case, and we do not write it into the law, then we have a gaping hole that exists in the law. Because as I said, I was only a criminal defense lawyer, the bad guy, for 4 years, but I know for a fact that there are in every State in the Union, as in mine, certain rubberstamp magistrates that you can go to, and they will issue a warrant for Mickey Mouse, if in fact a proper police officer standing over 6 feet tall, in the proper uniform, suggests that there should be one issued.

So that it seems to me that—I am sorry. Yes, you may.

Senator SPECTER. Thank you very much, Senator Biden. I just passed him a note asking if I might interrupt him for 30 seconds and I will be brief.

Senator MCCONNELL. I recognize the Senator from Pennsylvania.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. I just wanted to commend the chairman for convening these important hearings. I regret that I cannot stay because of other commitments, but I think that this is a very important subject, and I will be following the hearings closely, and I am pleased to see you here, Mr. Trott, and commend you for the good work you are doing. Thank you very much, Senator Biden.

Senator BIDEN. Thank you, Senator.

Senator MCCONNELL. The Chair will note that the subject matter brought out all of the former prosecutors today. Senator DeConcini was here as well.

Senator BIDEN. And so was a defense lawyer.

Senator MCCONNELL. And one defense lawyer. Senator Biden.

Senator BIDEN. It has always somewhat been the odds, Mr. Trott: One defense lawyer against several prosecutors. I have never walked into a courtroom where there have not been more than one, but fortunately, none——

Senator SPECTER. I object. I object.

Senator BIDEN [continuing]. Of them as competent as either of my two colleagues.

If I may proceed. Mr. Trott, you understand my concern, I suspect, because the four exceptions—obviously, if the magistrate was intentionally misled, as pointed out in the *Leon* case; or if the magistrate who issued the warrant was not neutral; or it was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or if a warrant were so factually deficient that the police could not reasonably presume it to be valid; I hope the Justice Department is suggesting that in that case, in any of those cases, the good-faith exception should not exist.

And so it seems to me we should do one of two things, at a minimum. We should either write those exceptions into the law, into

S. 237, or, we should wait for further clarification from the Supreme Court as to what they meant by it.

Because I have, in seeking requests for information on this from legal scholars, both opposing and supporting changes in the exclusionary rule, gotten varying opinions as to whether or not those exceptions constitute the law of the land.

So I wonder if you would comment on how we should handle—first of all, does the Justice Department subscribe to the four exceptions cited, and, second, if so, how should we deal with it?

Mr. TROTT. I think the exceptions are good exceptions. I think they are nothing more than a way of fleshing out what is meant by objective good-faith belief, reasonable belief.

I think the test itself already includes what you are referring to. It would be a further clarification but I do not think a necessary one, to give the courts of this land sufficient direction to know what to do in these circumstances.

Senator BIDEN. Would you have objection to us adding those four exceptions, state them explicitly in the legislation?

Mr. TROTT. Well, Senator, I have to study that, but sitting here right now, no, because I, as a prosecutor, in no way would ever try to sell a case like that to a court because that is not objective good-faith belief, when you are monkeying or tampering with a system in the way that is described in those four circumstances.

Senator BIDEN. Again, I am not being facetious when I suggest that I have no doubt about your reasonable exercise of a, quote, "blanket good-faith exception." I really do not.

But in the history of this land, we have not always had women or men as competent as you sitting in your position. We need only cite the attorney generals that have been dismissed, put in jail, or debarred, to lend credence to the statement I have just made.

So that that is why I am, you know, to cite the old saw, "We are a nation of laws, not men," and we have competent men and women now, but I am always skittish about whether or not we leave it to the good-faith exercise of the good-faith exception by good-faith women and men.

Mr. TROTT. Senator, your observation about rubberstamp magistrates is an accurate one.

In California we used to have a sitting municipal court judge—the superior court judges referred to him as the "law east of the freeway," and whenever they saw a search warrant that was issued by that magistrate, believe you me, they gave it careful and close scrutiny.

The point that I am making is that the system, in many respects, is self-policing. These are situations where you have reviews at different levels of these decisions.

If a magistrate in the first instance makes the decision, it is almost axiomatic, especially in felony cases, that there will be other judges along the line, before the trial, that will be reviewing this decision, and then of course the appellate courts of each State, and the Federal Government, remain available to self-police and make sure that the exceptions that you are concerned about—and that we are concerned about—are washed out of the system.

Senator BIDEN. I want to make it clear that—let me try to put this in some sense of proportion, at least how I feel about it.

There are those who argue that the requirement to make a good-faith exception or any other alteration of the exclusionary rule is a matter of such consequence that the republic hangs in the balance.

There are those who suggest, on the other side, that in fact if there is any alteration of the exclusionary rule, that the civil liberties of every American will be in such jeopardy that we will probably be only a step away from a totalitarian state next Wednesday. I do not subscribe to either of those positions. I understand the frustration as to how we got to where we are now, because of the inability to acknowledge any of the abuses that have, in effect, been thrust upon the system and the public by the exclusionary rule, or certain applications of the exclusionary rule.

But I view it more in an incremental sense. It seems to me that we have lived with this so long, that it is wiser to move to exceptions very consciously and very slowly.

For example, there was a move to amend the exclusionary rule prior to the decision in the *Leon* case. I think that was unwise.

We knew it was up before the Supreme Court. Many of us argued the exception would be granted under limited circumstances, and that we should wait to see what the Court does. If you go back and look at some of the legislation that was introduced with regard to the exclusionary rule over the last 10 years, it is out of whack, by a longshot—not what you are supporting but what had been put forward previously—out of whack with the *Leon* case.

The *Leon* case came along, and in the minds of all—except those who believe that civil liberties are in such jeopardy that we are going to collapse tomorrow—it was viewed as a progressive step. Now, I apologize for taking so much time, Mr. Chairman, but since I am the one that badgered the chairman for this extra day of hearing, and the chairman chastened me very accurately, suggesting that if I wanted the hearing I had better damn well show up and have questions. I have got a lot of questions.

And I will either yield now and come back, or pursue one more line of questioning with regard to tort claims.

Senator McConnell. Why do we not see if Senator Simon, who has joined us, has an opening statement.

Senator Simon. I will yield to the Senator from Delaware.

Senator McConnell. You are on, Joe.

You are paying a heavy price for asking for this hearing.

Senator Biden. Do you agree, Mr. Trott, that any modification to the exclusionary rule, by the Supreme Court is more likely, if an effective tort claims scheme is in place before the Court reaches the issue the next time around, assuming we do not move on this legislation?

Mr. Trott. I am not sure, Senator. It is possible. There is no question about it. The more ways you can shore up the fourth amendment, the more attractive it becomes to loosen some of the safeguards that have been in place.

Senator Biden. Would you consider the possibility of moving first on the Tort Claims Act, and after that is in place, then consider this modification? I know you have been supportive of attempting to move the Tort Claims Act, but the exclusionary rule seems to be a matter that is higher on the agenda than the Tort Claims Act.

Is there any prioritizing within the Department, not that there need be—but could you give us a sense of how you in the Department feel about the urgency of each of these? I suspect you will say both are urgent.

Mr. Trott. Well, I think both are important. I think they stand alone. They can travel together. I think this bill that we are talking about today is, as far as we are concerned, of a greater priority.

Senator Biden. My concern is that—I may be mistaken, and I ask any staff, in addition to mine, to correct me on this. But my recollection is, under Attorney General Smith there was a higher priority placed upon amending the Tort Claims Act.

Is that correct, or am I wrong on that? Because we were really working on it. Just speak up, anybody. It is true. That does not mean it is true, but——

Mr. Trott. I am advised that——

Senator Biden. That is my recollection, because I worked like hell on it, and I cannot remember why, other than the merits of it. Someone was pushing me.

Mr. Trott. I am advised that we included both titles in the Comprehensive Crime Control Act, and I do know that William French Smith placed a high priority on straightening out some of the problems with the Tort Claims Act, no question about it.

Senator Biden. And you know the breakdown we had there. It related to—maybe you do not know—but there was a request in the Department's submission for amendment of the Tort Claims Act that we go well beyond police officers, for example, dealing with OSHA.

Mr. Trott. Sure; yes.

Senator Biden. That is where we had a real breakdown.

One of the downsides of being the ranking member of this committee is I know less about the detail of specific items that come before us than I should, and more about all that is happening.

I become more of a generalist, unfortunately, and, my recollection is we have not gotten much of a nudge, this Congress, on the Tort Claims Act.

Have you all made, pushed us on that? I honestly do not recall. And while you are getting briefed, as I have had to be briefed, I may explain, state the obvious, why I am asking the question, because if that is correct, we all know that the way things move here in terms of modification of the criminal law, as we labored for 8 years to get the comprehensive crime bill passed, as little gets done unless the Department is pushing as hard as the Congress is pushing, and to be honest with you, unless it is pushing the Congress sometimes.

Mr. Trott. I am told—and this refreshes my recollection, that the problem with the Tort Claims Act is that we have been unable to agree at what the fix ought to be.

There is still some disagreement as to exactly what the fix should be; therefore that remains somewhat of a matter that is in limbo.

On the other hand, we are very firm as to what we believe the fix ought to be on the exclusionary rule.

Senator BIDEN. I would like to suggest something, because my view of not moving forward with this exception at this time, may not prevail. Your view may prevail, and the view of the chairman.

But whether or not it does, I would suggest that you consider, in effect, dividing the Tort Claims Act—I realize this is not a hearing on tort claims—between those relating to law enforcement officials, of a police nature, and the other enforcement provisions with the Federal Government. If you do that, I can almost guarantee you, although I speak only for all Democrats, right, Paul? I can only speak for all the Democrats in the Senate; I cannot speak for all the Republicans.

All kidding aside, I suspect we would be able to pass a tort claims bill in this Senate in very short order, if we could settle that problem, and then take up the separate issue of extention beyond traditional police agencies.

But I guess I would ask you to consider that, and I would appreciate, not for this record, or for this hearing, but if you all would get back to me on your feeling about that.

Mr. TROTT. We certainly will.

Senator BIDEN. Well, I really am taking too much of this witness's time. I know we have four or five other witnesses.

Senator MCCONNELL. Several others.

Mr. TROTT. If I may just slide in sideways, I have used a lot of California examples, but one that I quoted earlier, before you arrived, was a Colorado example. So it is more than just a California problem, Senator.

Senator BIDEN. It is basically a Western problem. [Laughter.] OK. I thank you very much, and I thank the Chair, and my colleague from Illinois.

Senator MCCONNELL. Thank you. Senator Simon, do you have any questions of Mr. Trott, or a statement?

Senator SIMON. I do not at this point, Mr. Chairman. I am here to get some wisdom from my colleagues from Delaware and Kentucky, and the witnesses.

Senator MCCONNELL. Thank you, Senator Simon. You may end up presiding at 11:30, if you stick around, because I have to leave then.

Thank you, Mr. Trott.

Our next witness was scheduled to be Jim Smith, the attorney general from Florida, and I understand he is in an airport somewhere; is that correct? So, we will move on down to Prof. William Greenhalgh from Georgetown Law School, who is the former chairman of the Criminal Justice section of the ABA. Professor.

Dr. WASSERSTROM. I am not Professor Greenhalgh. My name is Wasserstrom. I also teach at Georgetown. I think it might make more sense for me to go first since I am going to be very brief and I am just going to respond to some of what Mr. Trott said, if I might.

Senator MCCONNELL. All right.

STATEMENT OF SILAS J. WASSERSTROM, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW SCHOOL, WASHINGTON, DC

Dr. WASSERSTROM. Mr. Trott mentioned for example this case from Colorado and talked about the behavior of the police officer there, and it seems to me his real objection is to the ruling of the Colorado court and what the policeman did was illegal under the fourth amendment, and it is not really an objection to the exclusionary rule. I mean, a very simple point which people sometimes have trouble, I think, understanding, is that the exclusionary rule only comes into play if the police have violated the fourth amendment as the court interprets the fourth amendment.

Many of the problems which I think the Justice Department perceives in this area are really problems I think with the Court's decisions under the fourth amendment. That is, interpretations of the fourth amendment itself and the kind of powers the police should be allowed to have to search and seize.

His description of the Colorado case I think was meant to make the point that everything this police officer did was perfectly fine.

Well, if everything the police officer did was perfectly fine, then he did not violate the fourth amendment, because all the fourth amendment requires is that the police act reasonably. When the police act reasonably, there is no fourth amendment violation and there is no reason why evidence would be excluded.

He also gave a parade of horribles from California involving decisions of the California Supreme Court concerning searches of cars.

Senator **Biden**. Excuse me, Professor. I hate to interrupt you but since you are going to be brief, I do not want to miss the point.

You are suggesting that the determination of whether or not the police officer acted reasonably, in compliance with the fourth amendment, is somehow a separate and distinct issue from the exclusionary rule. I do not quite follow that.

Dr. **Wasserstrom**. Well, if the court determines that the police officer did act reasonably and in conformity with the fourth amendment, then there is no reason the exclusionary rule ever comes into play.

Senator **Biden**. Then the only time it comes into play is when they conclude he did not act reasonably.

Dr. **Wasserstrom**. That is right, and that is—I am sorry.

Senator **Biden**. So what?

Dr. **Wasserstrom**. Well, if it comes into play only when they have acted unreasonably, then——

Senator **Biden**. But who determines that? The court determines whether it is unreasonable.

Dr. **Wasserstrom**. That is right. The court interprets the fourth amendment.

Senator **Biden**. And by determining whether or not it is unreasonable, they are saying that this should fall within the exclusionary rule.

Dr. **Wasserstrom**. They are saying first, this violates the fourth amendment; therefore, the evidence should be excluded.

Senator **Biden**. Right.

Dr. **Wasserstrom**. That is right. But what Mr. Trott was objecting to——

Senator **Biden**. You are from Georgetown. You have been educated by Jesuits, have you not?

Dr. **Wasserstrom**. No. As a matter of fact, I have not. What Mr. Trott was describing in Colorado, I think his point was—if I understood him—was that this police officer acted in a way that should have been found to be constitutional. That is his real complaint.

OK. His complaint, then, is about the court's interpretation of the fourth amendment and not with the application of the exclusionary rule, and it seems to me that his examples from California were making really very much the same point: The court should have permitted searches of those care in those cases. If the court had permitted the searches of the cars in those cases, then what the police would have done would have been legal and there would have been no problem with the exclusionary rule.

The fact that the fourth amendment prohibits only unreasonable searches and seizures makes this bill, it seems to me, entirely unnecessary.

All this bill would do is say that where the police have acted in conformity to the fourth amendment, then the evidence should be excluded. Well, that is the law now.

Let me take up in somewhat more detail his California cases. He said he had hundreds of cases where evidence was excluded. Well, as you pointed out, Senator Biden, that means that he must have been dealing with police officers who were violating the fourth amendment hundreds of times, or the exclusionary rule issue never arises.

It seems to me you cannot have it both ways. You cannot say the police are doing a great job, and yet, there are hundreds of cases where what they have done was illegal.

He said, for example, that he had lots of cases where the police had inventoried cars under a decision of the court which said it was OK to do that.

And then later the court decided that that search was invalid. Those cases involved interpretations of the California State constitution. This bill would obviously have no effect on that; it would not apply in State court at all.

But in any event, those were interpretations of the State constitution.

Now the court announces for the first time that inventory searches of cars are illegal, and according to Mr. Trott, there were hundreds of cases out there where the police had searched the car before the new decision was announced.

Well, when the U.S. Supreme Court announces a new decision which expands the protections of the fourth amendment, it does it prospectively only; the decision does not apply with respect to searches conducted before the decision was announced.

So that kind of situation would never arise in the Federal system because the Court has made it clear that any kind of decision expanding the scope of the fourth amendment—and those decisions are not really likely to be coming down any time soon, I do not think—but when they were coming down, 10 years ago or so, 15 years ago, or so, they were always made prospective.

So police officers who relied on prior law were protected. That no exclusion was ordered anyway. The only thing this bill would accomplish with respect to changes in the law would be this. It would have the effect of saying that when the Court announces a new decision which would invalidate conduct which had previously been legal, that that decision should not apply even to the case itself.

That is, that the exclusion should not be applied even to the case where it is announced. It should never apply to older cases, anyway.

And the problem with that is, that if you do not apply the exclusionary rule to the case where the new rule of law is announced, you deter litigants from ever arguing for changes in the law. They have nothing to gain by it.

Even if they prevail on the court, convince the court that this has been a bad rule, the rule should be that there has to be a warrant here.

If they know that even if they win the case, they are going to lose the war because the evidence is going to come in anyway, then why should they bother to make the argument?

And if they do not make the arguments, then you do not have any kind of movement with respect to the fourth amendment at all. You do not have any kind of progress with respect to the interpretation of what the fourth amendment does or does not require.

Another problem with the good faith exception which is very similar is this. I think police officers everywhere, if they are going to do their job well, need to know just what it is that they are or are not allowed to do under the fourth amendment.

The only way they can know that is by courts telling them, this is OK; this is not OK. If you have a good faith exception the courts are simply going to stop doing that.

In any case where it is sort of close, where what the police did was near the line of illegality, or legality, the court is just going to say, "Well, we do not have to decide whether what they did was legal or illegal."

We do not have to tell you what you can or cannot do. The fact is that what you did was close enough, that you acted in good faith and so the evidence comes in.

Senator **Biden**. Well, is that true? Won't they be saying, the courts, I suspect that in fact they will be defining—if this were to pass—they would be defining much more specifically what constitutes good faith?

Won't they be looking at whether, like in the *Leon* case, it was a biased magistrate, or if no reasonable police officer could believe it to be legitimate, et cetera?

Won't they be further defining what constitutes good faith?

Dr. **Wasserstrom**. Well, in the area where you have searches conducted to warrants, as you did in *Leon* and *Sheppard*, the Court did explain to some degree what it is that constitutes good faith.

But I am thinking of cases where the issue is whether or not the police had a sufficient basis to conduct a warrantless search, whether they had probable cause to make an arrest, or whether they had exigent circumstances which would justify making a search without a warrant.

In those cases, let's suppose that what the police have in the way of basis for their search is something that may—some people's view would be enough to justify the search and other people's view would not be enough, the court could elaborate and say: "Look. When you're going to conduct an arrest or a drug transaction, say, on the street, you've got to see at least this much. And if you see this much, let's say an exchange of something wrapped up for money, that's enough; but if you don't see that, if all you see is somebody handing money to somebody else, that's not enough."

That kind of decision could help the police know what they can and cannot do.

Under the good faith exception it seems to me likely that what is going to happen, when you are dealing with trial courts that are burdened with many more cases than they can handle well, they are going to get a case where the police officer made an arrest, that the trial court is just going to say: "Look. I don't have to worry about whether this actually is probable cause or not; it's close, a close——

Senator BIDEN. Professor, you——

Senator MCCONNELL. Excuse me, Senator Biden. I have got to go. I just want to indicate that Senator Thurmond wished to have an opening statement inserted at the beginning of the hearing.

It is my understanding that through the miracle of aviation, the attorney general from Florida is here, and you can go back to him, Senator Biden, when you would like, and also, I understand that you are willing to take over the hearing, which I appreciate. I want to thank all the witnesses for being here this morning.

Senator BIDEN [presiding]. Professor, as I said, you know much more about this than I, but has not the development of our jurisprudential system been such that in fact, the courts are going to do the exact opposite of what you just suggested?

Notwithstanding they are overburdened, I cannot believe that a trial court and/or an appellate court, is not going to define, more and more clearly, the definition of good faith as they did with defining the reasonable man standard for the last 300 years.

I mean, we have a whole body of law that defines what constitutes a reasonable man.

Dr. WASSERSTROM. The outcome of the case is not going to turn on what they say, you see, because even if they say that what you did, officer, here, was unconstitutional under the fourth amendment, but because of the good faith exception it is close enough to the line, that the evidence will come in anyway.

Then the result is the same in the case, whether or not they find a violation or do not find a violation. You are talking about a tort situation where they are defining how reasonable a man behaves. Well, the outcome of that case turns on how the court decides whether or not the person——

Senator BIDEN. Well, I am probably missing something here, and since I tend to agree with the position you are putting forward, I am maybe somehow not being as sharp as I should be here.

But it seems to me, that in fact there will be many court cases that will turn on whether or not what was done was a good faith exercise by the police officer. That will be an issue.

Dr. WASSERSTROM. Senator, where you are talking about the question of whether or not the police had probable cause—for example, to conduct an arrest, to make an arrest—the question of whether or not they acted in good faith comes down to no more than the question of were they close to probable cause? It is the same question.

Senator **Biden**. Well, in part, it comes down to—let us be blunt about it. Sometimes, it comes down to no more than what the ideological predeliction of the judge listening to the case is.

Dr. **Wasserstrom**. That may be.

Senator **Biden**. Just as much as it does whether or not—I mean, I have been before judges who in fact are very, very strong civil libertarians, who will sit there and suggest—notwithstanding how close to the line it is—that in fact it did not meet that judge's standard of what constituted probable cause.

I mean, it seems to me you are painting a very one-sided picture. I agree with the thrust of what you are saying, but to suggest that it will not warrant defense attorneys moving forward to make the argument that in fact what the police officer did did not constitute a good faith exception, is a misrepresentation of what is likely to occur and what judges are likely to do.

Dr. **Wasserstrom**. There are two different situations. One situation is one where the defense attorney is asking the court to overrule a prior decision. In that sort of situation, it seems to me unlikely, that the litigants are going to push very hard for that, if at all, because even when the older decision is overruled, the new decision will not help them any.

Because where the police have relied on the old decision, they will be shielded by the good faith exception to the exclusionary rule, and so even if I were to prevail on the court, convince them to change, the court to change its mind about what the law should be——

Senator **Biden**. And that is assuming they are changing a standard that they have heretofore——

Dr. **Wasserstrom**. That is the first kind of situation. The second kind of situation is one where what is at issue is whether or not the police acted with the requisite factual basis for their conduct.

Senator **Biden**. As determined by the court?

Dr. **Wasserstrom**. Determined by the court. And it seems to me there, that what is likely to happen is, the court is going to say, look, we do not have to say exactly where the line is with respect to the factual basis that you need. If you are close to the line, wherever it might be, then that is good faith.

Senator **Biden**. All right. Well, I would say to you that that will depend in large part on the judge. Let me be very specific. If it is Ab Mikva, and he is convinced that the fourth amendment has been violated, notwithstanding that the court has moved forward, or the prosecution has said that the police officer acted in good faith, Ab, God bless him, is going to sit there and say—he is going to look awfully damn close to find a reason to prove that that was not done in good faith.

Dr. **Wasserstrom**. Some judges would do that. I think they would have to say that, "I think you acted in bad faith because this isn't even close to probable cause. I mean, that is the only way you could say it, I think. If it close to——

Senator **Biden**. They do not have to say "close." They would just say: "It does not meet the standard which I, the court, conclude, is good faith."

Maybe we have not practiced before the same judges. Now I admit there is more of the other kind of judges out there who will say—which worries me—who will say, "By the way, police officers want this guy nailed, there was in fact marijuana or cocaine, or a sawed-off shotgun, or whatever—notwithstanding the fact the fourth amendment has been violated, the guy acted in good faith, he was close—bang. Nail him."

I admit there are more of them than the other, but to suggest that a body of law will not develop defining what constitutes good faith, and that it is not in the interest of the defendant to make the case that it does not meet the good faith exception, seems to me to misrepresent the way the courts work.

Dr. **Wasserstrom**. Well, I think unless a court has——

Senator **Biden**. I guess I am not going to get my son into Georgetown Law School, huh?

Dr. **Wasserstrom**. I am not on the admissions committee. Unless the court has actually told the police that this is the sort of thing that you should not be doing, it seems to me that the judges will find that, despite the fact that we never told you you cannot do precisely this—the number of judges that will say, nevertheless, what you did was in bad faith—the number is small. Those judges are few and far between. I am not saying there are no judges that do that.

Neither of us has had any experience practicing before a judge operating under a good faith exception, so we are both speculating about how judges are likely to behave.

Senator **Biden**. That is true.

Dr. **Wasserstrom**. But my judgment is based on experience trying criminal cases in DC, where the courts generally, the trial courts at least, want to deal with these motions to suppress as quickly, and as expeditiously, as they can, for the most part, and if they can do it by simply saying: "Look. This is a close case. I don't have to decide right where the line is. It comes within reasonable good faith; therefore, the evidence is admissible."

It seems to me that is the way most judges, most of the time, will do it. I am not saying all judges do it all the time.

Senator **Biden**. I do not disagree with that.

Dr. **Wasserstrom**. Then you may have some law development, but it is going to be considerably slower than it would otherwise be.

Senator **Simon**. Just one question, and unfortunately, I am going to have to move on, and you have, by indirection, answered this I think, but not directly.

Does this bill violate the spirit of the fourth amendment?

Dr. **Wasserstrom**. It depends on what you take to be the spirit of the fourth amendment. In my view it does, but the way the Supreme Court has interpreted the fourth amendment over the last 10 years, I would not want to say that this bill is unconstitutional, given the current makeup of the Supreme Court.

That is, if I were simply to predict what the Supreme Court would do about this bill, I have very little doubt that they would find it was constitutional.

Senator **Simon**. But it is a substantial extension of the *Leon* decision, is it, or——

Dr. **Wasserstrom**. It is a substantial extension of the *Leon* decision and I think it is an extension which extends it to areas where it makes even less sense than it did in *Leon*.

Let me make one other point about the extension of *Leon*. With *Leon* the law, the police have an incentive to get warrants because they are shielded by a good faith exception which will protect them to some degree where they get a warrant.

If you extend the good faith exception and apply it across the board, then that added incentive, which they now have to get warrants, is dissipated. There is no longer any bonus that they get, in a sense, from getting a warrant. They are protected from some kind of good faith, sort of shield; even when they act without a warrant, protected against exclusion. It seems to me that is one of the bad effects of a bill of this sort that extends the good faith exception to those areas where they have acted without a warrant.

Senator **SIMON**. I thank you.

Senator **BIDEN**. I would like to ask another question, if I may.

Senator **SIMON**. I will let you soften your questions and get your son into——

Senator **BIDEN**. Well, I will, I will. I think I am going to work on Yale with the next question. Pretend you are teaching at Yale, Professor——

Dr. **WASSERSTROM**. That is where I went.

Senator **BIDEN** [continuing]. And disregard the law, and just talk about philosophy—I am looking for a philosophic input here, and I am being very facetious about Yale and Georgetown but I am being serious about this question.

Is there any validity to the argument that is made by so many people these days, admittedly on the center right or far right of the political spectrum, that respect for the law has been seriously eroded, as a consequence of many things, not the least of which has been the seemingly ineffective application of the criminal justice standards to people who are clearly bad guys, who clearly have the sawed-off shotguns, who clearly, deal in dope and who walk the streets? And I know that there are a number of cases, and I could cite ones where I represented a defendant, and, quote, "got the defendant off" because in fact I believed his fourth amendment rights were violated, notwithstanding the fact that he was not a good guy.

Unless we do something to remedy these cases where folks—to quote the Assistant Attorney General—with the "sawed-off shotguns get off scot-free" because of, as the public views it, a technicality, will we continue to do harm to the criminal justice system?

By the way, I compliment you on pointing out what I wanted to point out—the distinction between the California Constitution and the Federal Constitution, when Mr. Trott was here.

Second, isn't there a frustration buildup on the part of good, decent police officers, because of what appears to them to be, and in some cases is, a totally frustrating effort on their part to deal with some of the seamier elements of the American public? When things like those stated by Mr. Trott and others happen, doesn't that only make them more cynical, so that they commit more illegal acts against innocent folks out of frustration?

That they, instead of bringing that dope dealer in, shoot him? I am not being facetious. I am being serious.

Do you think there is any merit to those kinds of arguments that are made, and should a committee like ours consider that in the mix, when we are making judgments about alterations of, in this case, the exclusionary rule?

Dr. WASSERSTROM. Well, I think it is important to realize that the bill you are talking about of course will only apply in Federal courts, and the Federal courts, there has been an exclusonary rule now for 70 years, for fourth amendment violations.

So there is no reason to think there is more frustration out there now than there has been over the last 70 years. I am talking about FBI agents, other Federal law enforcement agencies like the Drug Enforcement Administration.

What you are saying I think may have more validity with respect to some State and local police forces than it would the Federal police forces.

But even with respect to the States, the exclusionary rule has been in force for 25 years. As I say, it is nothing new. I am sure that it is frustrating for a police officer to find that when he has arrested somebody who is clearly guilty, that the case cannot be prosecuted effectively because evidence has been excluded.

I do not really think it happens very often. My experience, as a defense lawyer, the number of cases where evidence was excluded, or cases were dropped because the evidence would have been inadmissible, there were not many.

The only offenses were the less serious kind of possessory offenses, usually drug possession defenses, small quantities of narcotics, arrested on the street—that kind of thing.

But I am sure it is frustrating for police officers. On the other hand, I am sure half of them that live within the confines of the fourth amendment itself, is sometimes frustrating for police officers.

That is, they cannot search and seize whenever they please. I think the cause of their frustration may, in many cases be, the rules themselves that say when they can search and seize.

That is a different question than the question of whether or not the exclusionary rule should apply when they violate those rules. And it may be that they should be allowed, for example, to search and inventory a car when they make an arrest of the driver. Well, that is a disagreement with interpretation of the California Constitution by the California Supreme Court. That itself I am sure is frustrating to police officers because it hampers law enforcement.

But that is an argument about something different. It is not an argument about whether or not, when they do violate the fourth amendment, the evidence that they obtain should be excluded.

And I just do not think that, at least as far as Federal law enforcement agencies are concerned, there is any reason to think that there is a demoralizing effect from the exclusionary rule. I mean, they have lived with it for 70 years, as I said.

Senator BIDEN. Thank you very much, Professor. I appreciate it.

Our next witness will be Attorney General Jim Smith here of Florida.

Attorney General SMITH. Yes, sir.

Senator BIDEN. Welcome. We appreciate your taking the time and effort to come all the way up.

Were you in Florida this morning?

Attorney General SMITH. Yes, sir, and I apologize for being late. We had fog in Atlanta, and we were about 45 minutes late.

Senator BIDEN. Anybody who has to go through Atlanta has a dispensation, automatically, and that is the only way I know how to get from there to here, just about.

General, I am here to listen to your testimony. Please proceed.

STATEMENT OF JAMES SMITH, ATTORNEY GENERAL, STATE OF FLORIDA, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ACCOMPANIED BY BILL BRYANT, DEPUTY ATTORNEY GENERAL, STATE OF FLORIDA

Attorney General SMITH. Thank you, Mr. Chairman.

I would like to introduce Mr. Bill Bryant who is the deputy attorney general of Florida, who is with me today, and I appreciate the opportunity to be here this morning and discuss a matter of considerable significance to our criminal justice system.

When I appeared before the Senate Judiciary Subcommittee on Criminal Law in March 1982, it was to advocate legislation limiting the judicially created exclusionary rule.

My earlier comments are a matter of record and I will not repeat them this morning. Basically, it was my opinion that the rule had become an obstacle to justice rather than a vehicle for justice.

This issue continues to be of special interest to the National Association of Attorneys General, as well as to the State of Florida.

Along with many other States, Florida faces a very serious crime problem. Our constant battle with drug smuggling and crimes related to drugs greatly intensifies the challenges faced by law enforcement and balloons the statistics that make us a high crime State.

Although Federal, State, and local law enforcement are making record seizures and arrests, they are bailing against the tide.

We must provide law enforcement officers and prosecutors with effective weapons to combat drug smuggling and other crimes that it spawns.

Much of the evidence upon which our prosecutions turn results from search and seizure conducted by law enforcement officers without a warrant in situations that require immediate action.

If we deny to the prosecution the ability to use drugs and other evidence seized, in good faith without a warrant, we seriously impair their ability to put drug smugglers out of business.

Since I last testified on this issue, the Supreme Court has issued two rulings that have helped curb use of the exclusionary rule as a means of withholding probative evidence of crime from our courts.

In two cases, *Massachusetts* v. *Sheppard* and *United States* v. *Leon,* the court held the exclusionary rule will not be applied in cases in which law enforcement officers seized evidence on the basis of a search warrant later found to be technically flawed, or faulty.

Instead, the court held that when a search is undertaken in good faith reliance on a presumably valid warrant issued by a neutral and detached magistrate, the evidence obtained is admissible.

In so holding, the court recognized that the rule's function of curbing police misconduct would not be served by excluding evidence from a search conducted as the result of a judicial error rather than police error.

However, the court cautioned that certain evidence would not be admissible under this good faith exception.

The exception does not apply to evidence seized through a warrant procured by a police officer who knowingly or negligently swears to materially false facts.

Nor does it apply to a warrant issued by a judge or magistrate who abdicates his position of neutrality.

With the implementation of this good faith exception for evidence obtained through search warrants, the battle to right the wrongs permitted by blind reliance on the exclusionary rule was half won.

But the Supreme Court left one question unresolved. It did not address the question of whether the rule applies to evidence obtained without a warrant by police officers who reasonably, but incorrectly, believe they have proper basis for their search.

It appears likely that the court will consider and validate this additional good faith exception in the near future, if I can predict the direction of the recent court rulings.

However, in my view, and because of the continuing drug problem that we have in Florida, the interests of safe, effective law enforcement require that we not wait for the judiciary to rule on this issue.

Adoption of Senator Thurmond's bill would accomplish this needed step much sooner and I urge its passage.

In closing, let me emphasize that I do not advocate the admission of evidence seized without probable cause or in bad faith. We should not ignore irresponsible police behavior by excluding probative evidence, nor should we reward the guilty.

In effect, that is what we do, when we allow the criminal courts to punish responsible police behavior by excluding probative evidence.

What I am suggesting is that we eliminate the all or nothing rationale, and allow admission of evidence seized by an officer acting in good faith with a reasonable belief, supported by objective grounds, that his conduct, or her conduct, was lawful.

The procedural rules guiding our criminal justice system should be a means for eliciting truth and ensuring fair and speedy trials. They should not be used as a means to withhold critical evidence and to frustrate justice. I will be happy to answer your questions.

Senator BIDEN. General, thank you very much. Before we begin, let me compliment you on a totally unrelated matter, on the phenomenal job you are doing under very difficult circumstances in the State of Florida.

Florida seems to have had visited upon it a national problem, and you in fact, and the State of Florida, and you particularly, General, I think you are doing an extremely commendable job in the circumstance that would boggle the minds of most other State attorneys general, and I compliment you.

Attorney General SMITH. Thank you.

Senator BIDEN. General, let me ask you a couple of questions, if I may. First of all, in the *Leon* case, as you know, the court defined with some specificity circumstances under which the good faith exception would not prevail in a warrant search and they cited four of those circumstances—a tainted magistrate, a warrant that is obviously flawed on its face, et cetera.

Now I assume that you have no objection to those stated——

Attorney General SMITH. No, sir. Not at all.

Senator BIDEN. Now, when you suggest that the Court only went halfway—and it did—I would like to ask you, that if you acknowledge that the exceptions stated to the newly created good faith exception in warrant searches are useful, or helpful, warranted—no pun intended—what do we do in the case of the warrantless searches, where in fact there are no similar guidelines? Should this committee, if it wishes to extend, legislatively, the good faith exception to warrantless searches, in fact define in a manner similar to that which the Supreme Court did in warrant searches, what in fact would not qualify as a good faith exception?

Attorney General SMITH. I think you would agree that it would be very difficult, legislatively, to do that. I would prefer that that be developed through case law, as I am sure it would be.

Senator BIDEN. Now, having said that, it gets me to my third point, and that is——

Attorney General SMITH. I think you are getting into a cliff here.

Senator BIDEN. Well, no, I never trifle with people who are probably going to be governors some day, especially in States that have such significant primary votes. I say that only for Senator Kennedy, I want you to know. I have no interest in anyone else in this committee. But I——

Attorney General SMITH. We have a couple good law schools down there, too.

Senator BIDEN. I have no further questions. [Laughter.].

In the Florida situation—no, let me back up. It is your view, that as it relates to guidelines of what constitutes a good faith and what does not constitute good faith search, warrantless or warrant, that the preferable route is not to attempt to legislate that but to let case law develop to define that. Is that correct?

Attorney General SMITH. Yes.

Senator BIDEN. Now would you rather have, assuming you could get the same result—would you rather have the good faith exception extended to warrantless searches by the Congress or by the Supreme Court, assuming the Supreme Court tomorrow were about to——

Attorney General SMITH. Well, I think the Court, I believe the Court is headed in that direction. Because of the real life problems that we have in Florida today, we—you know—when we lose major drug cases, they are on motions to suppress, usually over the warrant, or, you know, those kinds of problems, and I would like to see the Congress move—you know, we—and I do not want to be dramatic—but we really have a crisis situation in our State.

We have spent—3 years ago, we appropriated—new—$200 million in our State budget for law enforcement. We have had dramatic increases in Federal law enforcement in our State, but during that period of time, the price of cocaine has gone from $60,000 an ounce down to about $15,000 or $20,000. The quality of it has gone up. You know, it is inundating our high schools. You know, we really need help, and I think Congress acting here would help us.

Senator **Biden**. Let's speak to that for a second because that is the point. We have a tendency—not you—we, in the Congress, have a tendency to see a problem, attempt to solve it, initiate an effort and pass legislation to, quote, solve the problem, and after reflection, observe that our solution has little impact upon the real problem.

For example, we spent years and years talking about street crime, and we had a lot of people up here, and both parties declaring war on crime, until somebody finally pointed out, by the way, 96 percent of all that street crime, there is nothing the Federal Government can do to impact on it.

All of a sudden, Federal officials stop running on the issue of, "Elect me Senator to stop rape in the parking lot." And so what we are doing here as—I am a little worried that the Attorney General, or the representative of the attorney general, Mr. Trott, and you General, and many, many others, my own attorney general—I mean all across America—have real serious problems in their States.

And my question is, assuming we pass this law, what impact could it have in the State of Florida? Because in all those cases in the State court, as I understand it, they are still going to be applying a Florida law, an interpretation of the Florida Constitution, right?

Attorney General **Smith**. Well, but under our State constitution we follow whatever the Federal standard is in this area.

Senator **Biden**. Well, you mean to tell me that if we, legislatively, change the standard, that that amends your constitution?

Attorney General **Smith**. We follow whatever the Federal standard is and that can change, and we passed that constitutional amendment before some of these, you know, U.S. Supreme Court cases came out, with a hope that there would be a change in Federal law.

Senator **Biden**. Well, I will not badger you on that point right now.

Attorney General **Smith**. I mean, we have a moving standard in that area. We follow Federal law.

Senator **Biden**. You mean the courts have determined by case law they will follow it, or, there is something written in the constitution of the State of Florida?

Attorney General **Smith**. I cannot recall the precise language, but basically, our State constitution says we follow whatever the Federal standard is.

Senator **Biden**. Well, I would appreciate it—and I will not pursue the matter with you now—but I would appreciate it if you would have your staff, one of your assistants——

Attorney General **Smith**. We would be happy to. And frankly, we did that as a result of, you know, some Florida supreme court decisions that were really more limiting in this area, you know, than the Federal, and we felt—usually, you know, you feel like you are safer with your State courts. We felt like we might be in better shape with Federal courts and so we——

Senator **Biden**. Well, General, again, I do not want to pursue it, it is catching you a little offguard here on this, but I would appreciate it if you would have your staff submit, in writing——

Attorney General SMITH. Sure.

Senator BIDEN [continuing]. An answer to the question of whether or not the Florida Constitution calls for following the Federal constitutional standard, or the Federal statutory standard, which are two different items. Because if in fact it is the latter—and I do not know enough to know that it is—but if it were the latter, I think you would have to admit, then, that what we do here, notwithstanding what the objective is, and what your real problem is, we would not have had much impact.

Now, if in fact your constitution, which is—I guess it would be somewhat exceptional in this regard—if it were to follow Federal statutory language, which in effect means that the Congress can amend the Florida State Constitution, then I would say that we would be, quote, "helping you", from your perspective. But having said that, let me move to the next point.

Attorney General SMITH. But to answer the question we started out on, I mean, I certainly could not sit here and say that passage of this legislation, you know, would dramatically reduce the crime rate in the State of Florida. That would be naive.

Senator BIDEN. No, and by the way, I know you are not attempting to say that, but I would assume that one of your hopes is that it would in fact dramatically reduce the number of cases where evidence is suppressed because of what you believe to be good faith initiations by police officers in your State, which in fact, unfortunately, do not comport wth the Court's interpretation of what is tbe proper application of the fourth amendment.

Let me just move on. I know you are a busy man and you have many places that you must go, and I appreciate your coming up here.

But let me get to the last point. I am very concerned that if in fact we are correct—if in fact I am correct—that it would be better for all concerned, even those whc strongly support amending the exclusionary rule, for the Supreme Court to do that, in the area of warrantless searches, then, I think we are moving somewhat prematurely, because it would seem to me that it is better to do the following. And I would just like you to comment on this and then I will stop. If anything, we should codify the Supreme Court's decision on warrant searches, and move on the Tort Claims Act, and wait for the Supreme Court to go in the direction that you and I, and everybody believes they are moving, including the Justice Department, under what circumstances a good faith exception would prevail in warrantless searches.

That seems to me to be a more prudent and reasonable way to go because the urgency, at the Federal level, to the extent that it exists, is somewhat miniscule compared to the extent that there is an urgency that exists at a State level, which in fact we, from a statutory standpoint, could not impact on anyway.

That is somewhat my emerging position, if you will. I would like you just to comment on why you would disagree with it, if you do.

Attorney General SMITH. My response would be that if there were a real, you know, a major concern that this legislation would trample on the fourth amendment, then I would say we should wait on the Court. The previous witness gave the opinion that the legislation, he felt would be, you know, declared unconstitutional in that sense.

I think the Congress really has the responsibility to set policy and not wait on the Court. I think in areas of constitutional interpretation, that should be a matter for them and not the Congress.

Senator BIDEN. I appreciate it, General. Let me just say in conclusion, that just as I think most of us would agree, that the Court would have made a mistake if it just said nothing more than good faith was necessary in the *Leon* case, and, if it failed to go on and cite guidelines, as it did at a minimum, in the four instances they cited—just as we would have sat here and said that the Court should have said more, it seems to me that we should act as responsibly as the Court is acting.

And that if we are going to put in a good faith exception, we had better do as the Court did, and do what we all acknowledge to be a very difficult thing, as it was for the Court, and that is, to define circumstances under which there is not good faith.

We have never, in our law, allowed a stupid person's interpretation of an existing principle in our constitutional law and/or statutory law, to rise to the level of being treated with respect within the courts, regardless of how much good faith that not-so-right person had.

Attorney General SMITH. Right.

Senator BIDEN. It is not part of our English jurisprudential system to reward stupidity, and so I am worried that if we all agree, and that there seems to me a mounting—mounting, that is an exaggeration—there seems to be, at least this morning, some consensus that the Court acted wisely in *Leon*. We should do at least as the Court does, and not do what the Court did not do, and that is, just have a blanket good faith exception.

I sincerely appreciate your time and your effort, and your suggestion of Florida law school. He is not even in college yet so——

Attorney General SMITH. It is warmer there, so——

Senator BIDEN. Thank you very much.

Attorney General SMITH. Thank you very much, Mr. Chairman. I appreciate it.

[Responses to questions follow:]

DEPARTMENT OF LEGAL AFFAIRS
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JIM SMITH
Attorney General
State of Florida

October 9, 1985

Honorable Joseph R. Biden
United States Senator
SR-489
Washington, D.C. 20510

Dear Senator Biden:

At the Senate Judiciary Committee's October 2 hearing, I recommended that the "warrantless" version of the good faith exception to the exclusionary rule be adopted through passage of Senate Bill 237, introduced by Senator Strom Thurmond.

You asked during the hearing that I provide a written response on the following questions:

1. Why not wait until the United States Supreme Court extends the good faith exception to non-warrant cases?

2. What effect would a change in federal statutory or case law have on Florida in light of the 1983 amendment to the search and seizure section of the state's constitution?

In answer to your first question, I believe that the interest of safe and effective law enforcement requires that legislative action be taken to promptly extend the good faith exception to non-warrant searches and seizures.

In the absence of legislation, we can only hope that the Supreme Court will, in fact, decide the issue in a forthcoming case. It is my view that this places a critical evidence-gathering function in limbo for an uncertain period of time, and continues to have a chilling effect on reasonable and proper searches and seizures by police officers.

It is true that at one time the Supreme Court apparently intended to address the non-warrant version of the good faith exception, judging from the fact that it agreed to review the decision of **People v. Quintero**, 657 P.2d 948 (Colo. 1983), cert. granted, 462 U.S. ____, 77 L.Ed.2d 1386 (1983), wherein the Colorado Supreme Court had rejected the applicability of this doctrine. However, before that case could be resolved, the defendant died, requiring a dismissal of certiorari, pursuant to the court's long-standing policy against issuing advisory opinions.

In addition to the uncertainty of a court decision on this issue, there is another reason for legislative action. Action by Congress will affirmatively state the policy of the United States on this issue, providing a clear basis for future judicial interpretation. I believe this approach is far more desirable from a legal standpoint, and would lend the weight of law to a judicially-adopted policy.

Florida has a special interest in seeing the Thurmond bill passed because our constitution requires that state courts determine the admissibility of evidence obtained in police searches on the basis of United States Supreme Court interpretations. Article I, Section 12 of the Florida Constitution, reads as follows:

> Section 12 **Search and seizures.**--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. **This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.** [Emphasis Added]

This section explicitly provides that Florida's state courts may not afford greater protection from searches and seizures than those afforded by the United States Supreme Court in construing the Fourth Amendment to the federal constitution. Thus, if Senator Thurmond's bill becomes law and our nation's highest court finds its adoption of the "warrantless" version of the good faith exception consistent with Fourth Amendment principles, this will become the law in Florida as well. In my opinion, that result will be expedited if S. 237 becomes law.

I appreciated the opportunity to appear before the committee last week to testify on this issue, and hope my comments are helpful. If you need further information, please let me know.

Sincerely,

Attorney General

JS/pac

Senator BIDEN. Prof. William Greenhalgh of the American Bar Association, and Mr. Tony Califa, legislative counsel, American Civil Liberties Union.

Dr. GREENHALGH. American Criminal Lobby I believe that the ACL——

Senator BIDEN. The American Criminal Lobby?

Dr. GREENHALGH. That is what the attorney general said about my colleague on my right. He has not gotten quite to the ABA yet.

Senator BIDEN. That is true. That is the same guy that moved on Presser and Hutton, and all those people.

Dr. GREENHALGH. That is why I want to welcome you as the fifth in seniority at Georgetown Law Center, because you will be our distinguished Ryan Lecturer on the evening of November 6 at 8:15 p.m.

Senator BIDEN. I wish you would invite Mr. Meese to be there with me because I am going to be speaking a lot about him, and about the Justice Department's——

Dr. GREENHALGH. Anyway, I might be able to help you with your son.

Senator BIDEN. I just hope he can get through college. [Laughter.]

By the way I hope you are noting the laughter. [Laughter.]

All right, gentlemen, proceed in any order that you think is most appropriate.

STATEMENT OF A PANEL CONSISTING OF WILLIAM W. GREENHALGH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW SCHOOL, ON BEHALF OF THE AMERICAN BAR ASSOCIATION; AND TONY CALIFA, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Dr. GREENHALGH. Senator, let me make a few observations on my colleague, Brother Trott, from west of the Mississippi.

I have been teaching the fourth amendment for 28 years, 5 years as an assistant U.S. attorney, where I lectured the metropolitan police department of this city, the detective bureau, with regard to certain decisions that came down between 1958 and 1963.

That was the zenith of the so-called Warren court. Such cases as how to work within the frame of *Miller, Giordenello, Henry, Silverman, Chapman,* and of course one of the most important was *Wong Sun,* which was decided in the winter of 1963.

It was my duty and responsibility to go to these detectives and try to work within these decisions, in order that they would go out, and secure search warrants. We are talking about 1958 to 1963. We are not talking about 1985, you know, post *Leon* on that.

Senator BIDEN. Yes.

Dr. GREENHALGH. And it seems to me that if you can do that at that stage with the hot breath of the Warren court coming down on law enforcement from a Federal point of view, you certainly ought to be able to do it in 1985.

Second, I was consulted in the *Quintero* case to assist the public defender office of the State of Colorado in writing the brief for the Supreme Court in that matter.

I would like to say that the reason as to the motion to suppress, that the trial court had granted, and which was affirmed by the Colorado Supreme Court was, that when Ms. Berger said that there was somebody suspicious, she never told them exactly what he was doing until after he was arrested.

In other words, there was no information upon which that officer could, at that time, establish probable cause, until after he was not free to go.

Second, Senator—and this is something Mr. Trott forgot to tell you—would you believe, that the Colorado Legislature had passed a good faith statute——

Senator BIDEN. That was in existence at the time?

Dr. GREENHALGH. In existence at the time, which was rejected by the highest court of that State. I suggest to those staffers back there that are interested in this, they may want to pull the *Pacific 2nd* decision of the Colorado Supreme Court, written by Chief Justice Ericson, as to the reasons why they did not buy the good faith statute under the facts of that case.

Senator BIDEN. Let me make sure I understand. The court rejected as being unconstitutional the good faith exception?

Dr. GREENHALGH. No. They did not reject it as unconstitutional. They said it does not apply under the facts of this case.

Senator BIDEN. Got you. OK.

Dr. GREENHALGH. But anyway there was—there are not many of these "cats" hanging around. You know, there are a lot of—I mean, Arizona I think has gone overboard with regard to a good faith exception on a statute, and maybe one or two others. But anyway, Colorado was in the pipeline as such.

Senator BIDEN. Got you.

Dr. GREENHALGH. Second, the staffers behind you might be interested in pulling a case called *United States* v. *Gant,* G-a-n-t, cited at 759 Fed. 2d, 484, fifth circuit, 1985, decided as of May 6.

Senator BIDEN. Did you have any of these, staffers?

Dr. GREENHALGH. I do not know. They keep yawning back there. I just want to try to keep them awake.

Senator BIDEN. You have one. I am not sure how many more.

Dr. GREENHALGH. I do not know who they are.

Senator BIDEN. All right. I just wondered.

Dr. GREENHALGH. Anyway, the *Gant* case, Senator, I suggest to you is an excellent explication of the four exceptions which you, shall we say, fortunately, have been dwelling on this morning, in its interpretation of whether suppression is still an appropriate remedy.

It was written by the chief judge of the fifth circuit along with Judge Goldberg and Judge Tate. It is a real good case to explain exactly what *Leon* decided and interpreted, and the fact that those, one of those, any of those, any one of those criteria is not met, then suppression is still an appropriate remedy.

I think the most important thing that we are getting to here is, is this legislation necessary? That has come through loud and clear this morning.

It is the American Bar Association's position that it is not, for the simple reason that we ask the Congress to wait, because we knew that the Supreme Court would be working its will with regard to the *Leon* and *Sheppard* cases.

Now that those cases have been decided, it seems to me that we should wait, once again, as to whether or not they are going to grant a writ of certiorari dealing with warrantless seizures on public space.

Senator BIDEN. What is your considered opinion on the likelihood of that?

Dr. GREENHALGH. They have been dormant in this area for 14 months. Next Monday, they may, you know, grant a writ, because that is the first Monday in October.

They denied a writ of certiorari in a case called *United States* v. *Morgan* last year, where, as I recall, there were three Justices that were interested in the subject matter but they did not get a fourth vote.

Frankly, Senator, based on my knowledge of the some 240 cases dealing with the fourth amendment since 1914, I think they are waiting for the dust to settle a little bit, for the circuits to work their will in the Federal arena, with regard to cases like *Gant,* and, then also, to see what some of the State supreme courts are going to do.

In relation to those four exceptions, Senator, three of those exceptions are easy for interpretation, dealing with warrantless seizure. One is not, and that is the neutrality and detachment of the magistrate.

In a warrantless situation, first of all, you have no affidavit by which you can attack, as far as a motion to suppress is concerned.

Second, all you are going to have is the testimony of the officer, what he saw and observed, or what information he received, you know, from third parties, on that.

The whole history of the exclusionary rule has always been that all searches and seizures are per se unreasonable without judicial authorization, except for, right now, nine carefully defined exceptions to that. The whole idea of the warrant clause, which has been described in the Constitution, as interpreted by the Supreme Court, is the neutral and detached magistrate—you know—interposing his authority between the policeman, and you and I, as citizens of this country.

There is no way that a police officer, State, Federal, or local, is neutral and detached. So, in writing this opinion, I suggest to you that Justice White has written himself into some sort of a box which he is going to have a very difficult time, if he is going to use this rationale—you know—for a warrantless seizure situation. I do not see that coming.

That is not to say they can write something else. They can loosen that particular exception in some way or do something else along that line. But as of now, neutrality and detachment does not enter a police officer's mind because that is his job, to be suspicious, to have probable cause, to go out and make arrests, and then perform the subsequent searches and seizures. So, I do not see that.

So when you talk about writing these four exceptions in there——

Senator BIDEN. Well, I was trying to make the point.

Dr. **Greenhalgh**. I understand, I understand that, but I seriously question the neutrality and detachment argument that Justice White said in part III C of that opinion. The other thing I would like to bring to the attention of the committee: For 107 years, since 1878, good faith has never been the test. It has always been probable cause.

We go back to a bunch of civil cases, *Stacey* v. *Emory*, which was a civil suit for damages because an income tax collector went a little "bananas" and seized something, and as a result he was sued.

And the allegation was, "Well, he was malicious." The Supreme Court at that time, in 1878, said motive is not important; the only thing that is important is whether that officer had probably cause.

You bring that down to 1923, *Director General of the Railroads* v. *Kastenbaum*. Same argument. Probable cause is the test, not good faith.

One of the leading cases, the first exception carved out by the warrant clause in 1925 was *Carroll* v. *United States*. Same argument; the test is probable cause.

Take it on further, the *Henry* case in 1959; *Beck* v. *Ohio* in 1964; all the way forward. Good faith has never been the test. It has always been probable cause.

Senator **Biden**. If I can interrupt you there for a second. One of the reasons for the confusion—I think it exists among some of my colleagues and it is a bit presumptuous for me to suggest whether or not anyone is confused, but I think they confuse probable cause with good faith.

Because some who do not spend time on this committee or on this issue—which in the overall scope of the problems this country faces, is not the preeminent problem we should be dealing with, or are dealing with—they make the following kind of argument: that a police officer who has a warrant in his hand that is flawed, had probable cause to believe he could knock the door down.

And the police officer who was told by so and so that such and such was happening, even though it turned out to be a violation of the fourth amendment, had probable cause because he acted in good faith.

Do you understand what I am trying to say?

Dr. **Greenhalgh**. Yes.

Senator **Biden**. For those who do not think of it in purely legalistic terms, the actual person out there thinks probable cause is the same as good faith.

It has never been easy, as you know better than anyone, probably, in this room, in light of the amount of time you have spent in dealing with the fourth amendment, and I am not being solicitous, I am being serious—defending the fourth amendment or the fifth amendment.

When I first got here in 1974, if I am not mistaken, and I believe this to be accurate, there was a petition being circulated in the Capitol trying to get Senators and Congresspersons to sign a petition that reworded the Bill of Rights, but had the same principles, but just used it in, quote, "common everyday language."

They only could get something like 30 Members of the House and Senate to sign it, because it is pretty radical stuff in the minds of folks out there.

When you talk about the fourth amendment, or you talk about the fifth amendment, they say, well, you are guilty or you are not guilty. But what our Founding Fathers understood better than anyone, was that the constitution in part defends against the natural inclinations of men, as much as anything else.

And so the reason I raise it is that you will hear—and I am sure it must be frustrating to you—people, who otherwise should know, interchanging the phrase "probable cause" with "good faith," and I think that is part of the confusion, and I wish I could figure out how, and succinctly, to make that distinction.

Dr. GREENHALGH. I strongly suggest to you, because of your zeal and interest in this matter, if you do trace these cases, of *Stacy* v. *Emery,* in 1878, *Director General of the Railraods*—which was a war case that was decided in 1923—v. *Kastenbaum, Carroll* v. *United States,* 1925, Henry in 1959, and *Beck* v. *Ohio* in 1964,[1] you will see the thread going all throughout our history, and all of these cases were warrantless situations, none dealing with warrants.

The Supreme Court, consistently, for 107 years, which is some precedent, even with this Court, some precedent, that good faith has never been the test, it has always been probable cause.

It is difficult, I agree with you, to try to persuade people that that is what the law has been for such a long period of time.

Now, when you have *Leon* and *Sheppard,* and the Court—and this is based on Justice White's concurring opinion in *Illinois* v. *Gates* which was decided a year before, he wrote in effect 80 percent of his opinion in *Gates,* for *Leon,* you know, the year before. There is no question about that.

Still, the important thing is, you are dealing, as you suggest, 96 percent of law enforcement is on a State level as opposed to the Federal, and we are talking about warrantless situations, for the most part on public space. We are not talking about warrants, for search warrants going into houses, or things like that. That is why it is so important to try to make them understand that we still have—and every single one of the Supreme Court Justices, including Justice Rehnquist and Justice O'Connor have written in their opinions—you know—as far as we are concerned, all searches and seizures without judicial authorization are per se unreasonable except for these exceptions.

And what I think is—if they mean what they say, then the warrant clause still exists, but the unfortunate thing is the attack, the frontal attack on the warrant clause itself, and this is part of that process which you suggest.

Senator BIDEN. Thank you, Professor.

[Prepared statement follows:]

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[1] *Stacey v. Emery,* 97 U.S. 642 (1878); *Director General of Railroads v. Kastenbaum,* 263 U.S. 25 (1923); *Carroll et al. v. United States,* 267 U.S. 132 (1925); *Henry v. United States,* 361 U.S. (1959); *Beck v. Ohio,* 379 U.S. 89 (1964).

STATEMENT

of

PROFESSOR WILLIAM W. GREENHALGH

on behalf of the

AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee:

The American Bar Association is pleased to appear before you to express our views on the subject of S. 237, legislation which would limit the application of the Fourth Amendment exclusionary rule. My name is William W. Greenhalgh. As a former Chairperson of the ABA Criminal Justice Section, I have been designated by ABA President William W. Falsgraf to represent the Association.

My own background in the criminal justice area has included both prosecution and defense experience. I am presently a clinical professor of law at Georgetown University Law Center and have been Director of the E. Barrett Prettyman Program (L.L.M. in Trial Advocacy) since 1963. That program has represented over 2,000 indigents charged with felony offenses in the various courts of the District of Columbia. It has produced, among others, a book entitled, "Law and Tactics in Exclusionary Hearings" (Coiner Publications, 1969).

Before going to Georgetown, I worked as a staff attorney with the Justice Department's Internal Security Division, and served in the U.S. Attorney's Office in Washington, ending my tenure as Chief Assistant U.S. Attorney for the District of Columbia, General Sessions Division.

Just as the American Bar Association is, of course, reflective of the legal profession as a whole, so, I should note, is the Section of Criminal Justice representative of all segments of the criminal justice system. The Section is neither the voice of the defense bar nor the prosecution. Our members include prosecutors, criminal defense lawyers, public defenders, judges, law professors and law enforcement officials. We try to reflect that balanced view in policy positions which we adopt.

ABA POSITION SUPPORTS EXCLUSIONARY RULE

The American Bar Association has long supported retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. We continue to do so, and urge this Committee to approach this issue cautiously -- and reject proposals to limit the application of the rule further in criminal trial proceedings. Despite the assumption of critics today, its abolition will not stem the tide of crime in our country -- but tampering with it will destroy a portion of the cherished constitutional fabric of which our system is constructed.

To say that the federal exclusionary rule has not worked is to ignore experience. It has contributed to substantial law reform by federal authorities. It has increased the professionalism of federal law enforcement officers. It has vastly enhanced the integrity of the federal judicial process.

Very importantly, empirical evidence reveals that the operation of the rule has not greatly affected case dispositions. The overwhelming percentage of guilty pleas and convictions in federal courts provides ample proof that the rule has not stultified either federal law enforcement or the judiciary.

There are four principal reasons why we believe action on S. 237 or similar legislation is unwise at this time -- or that, at a minimum, the legislation needs to be carefully considered in light of the impact of the U.S. Supreme Court's July, 1984 decisions in *U.S.* v. *Leon*, 104 S. Ct. 3405 and *Massachusetts* v. *Sheppard*, 104 S. Ct. 3424, both decided July 5, 1984. I will explore each of these in turn:

1. S. 237's present language would sweep away four exceptions where the supreme court in Leon declared that suppression is still appropriate.

2. Extension of the good faith test to warrantless situations represents a major leap beyond Leon.

3. More recent and comprehensive empirical evidence raises doubts about the true impact of the rule in criminal cases.

4. Results from the U.S. Department of Justice study now underway to analyze the practical impacts of Leon should be reviewed beofre a broader exception is considered.

S. 237's PRESENT LANGUAGE WOULD SWEEP AWAY FOUR EXCEPTIONS WHERE THE SUPREME COURT IN LEON DECLARED THAT SUPPRESSION IS STILL APPROPRIATE.

Any discussion of a good faith exception to the exclusionary rule must, of course, begin with the U.S. Supreme Court's decisions in Leon and Sheppard. These cases carved out a limited good faith exception in warrant cases. Specifically, the Court held that the exclusionary rule does not bar the use of evidence obtained in violation of the Fourth Amendment if the police acted in objective good faith reliance on a warrant that later proved to be defective. The Leon Court, however, stated that suppression is still an appropriate remedy if one of four factors is present:

1. that the magistrate is not neutral and detached;
2. that the magistrate or judge in issuing a warrant was either intentionally or recklessly misled by information contained in an affidavit;

3. that the officer relied on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (Brown v. Illinois, 422 U.S. 590, 610-11 (1975));
4. or a warrant is so facially deficient (i.e., in failing to particularize the place to be searched or things to be seized) that the executing officers cannot reasonably presume it to be valid. Id., 104 S. Ct. at 3421-22.

Yet S. 237 would sweep away these limitations. S. 237 provides in part that, "A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation."

S. 237 would thus substitute a lesser standard for assessing objective good faith than that established by the Supreme Court in Leon. This proposed language in the bill is, therefore, at best a poor policy judgment flying in the face of the Court's majority opinion; and, at worst, may be unconstitutional.

EXTENSION OF THE GOOD FAITH TEST TO WARRANTLESS SITUATIONS REPRESENTS A MAJOR LEAP BEYOND LEON.

An overriding reason it is not desirable to extend the good faith warrant exception to warrantless searches is that this expansion would negate a desirable consequence of the Leon and Sheppard decisions: if the good faith exception is limited only to seizures conducted pursuant to a warrant, the police will have an additional incentive to obtain a warrant. And as the Court stated in Leon:

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment

> of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime," United States v. Chadwick, 433 U.S. 1, 9 (1971) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948), we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." Id., at 104 S. Ct. at 3417.

Note 13 of Leon is critically important, for it states that "nothing in this opinion is intended to suggest a lowering of the probable cause standard." 104 S. Ct. at 3417, n. 13. An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause--and substitutes instead a far less reliable procedure of an after-the-event justification for the arrest or search. This method is too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. Beck v. Ohio, 379 U.S. 89, 96 (1984).

Let me proceed now to analyze whether Leon and Sheppard are workable precedents for good faith warrantless searches and seizures. Until these cases were decided, there was no Court precedent for a good faith exception to the rule. The key to the fact that the Court will be reluctant to extend the good faith exception to warrantless searches is evident in its rationale in Part III C of the Leon decision.

Let us compare a facially deficient warrant (i.e., in failing to particularize the place to be searched or the things to be seized) to a factual situation where the description of alleged criminal activity is so vague and amorphous that it amounts to mere suspicion, which traditionally has been insufficient to justify a warrantless seizure. Wong Sun v. United States, 371 U.S. 471 (1963). Citizens ought not to be deprived of personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion, the Court has said. Rice v. Ames , 180 U.S. 371, 374 (1901).

Regarding the so-called "untouched probable cause standard," the test would undoubtedly be the same. No officer could manifest objective good faith, whether relying on a warrant based on an affidavit, or making a warrantless arrest, so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. The Court cites Justice Powell's concurrence in Brown v. Illinois, 422 U.S. 590, 611 (1975). This would appear to satisfy the first of the three Brown criteria enumerating flagrantly abusive violations of Fourth Amendment rights. The others are that the arrest was effectuated as a pretext for collateral objectives or the arrest was unnecessarily intrusive on personal privacy. By failing to include the latter two, the Court apparently concedes that these violations of the Fourth Amendment would be inapplicable to warrant situations.

On the other hand, under warrantless circumstances, the violations can become crucial, especially in a more insidious way, such as a pretext arrest, United States v. Lefkowitz, 285 U.S. 452, 467 (1932); See also Gustafson v. Florida, 414 U.S. 260 (1973) (Stewart J. concurring), or by an infamous method, as with a stomach pump. Rochin v. California, 342 U.S. 165 (1952).

A third factor to be tested as to whether suppression is an appropriate remedy is discussed in Franks v. Delaware, 438 U.S. 154 (1978). In that case, the Court held that the evidence seized predicated on a search warrant affidavit, which had been shown to contain intentional or reckless material misstatements, should be suppressed. It is somewhat doubtful that the Franks rationale laid down in Leon can be used to apply in a warrantless situation. First, there is no affidavit upon which either deliberate or reckless falsehoods used to obtain a warrant can be tested. Secondly, there is no magistrate to be misled. (This is one of the central themes running through the entire Leon case). Instead it is the judge, at a suppression hearing, who will consider the demeanor, behavior, accuracy, motive, and prejudice of the witness, in weighing credibility; he alone will make the determination that the witness is neither committing perjury nor making statements with reckless disregard for the truth. A conscientious motions judge might detect perjury, but the Court has offered no guidance as to what constitutes a reckless disregard for truth in Fourth Amendment cases. United States v. Davis', 617 F.2d 677, 694 (D.C. Cir. 1979). However, no matter what, there must be an appropriately objective definition of recklessness to be consistent with Leon.

The last of the criteria laid down in Leon, and by far the least analogous to warrantless situations, is the lack of neutrality and detachment of the seizing officer. If a magistrate cannot be financially interested, Connally v. Georgia, 429 U.S. 245 (1977), nor act as an adjunct law enforcement officer, Lo-Ji Sales v. New York, 442 U.S. 319, 326-27 (1970) , not be a chief investigator and prosecutor, Coolidge, v. New Hampshire, 403 U.S. 443, 451 (1971), then a law enforcement officer "while acting under the excitement that attends the capture of persons accused of crime," Lefkowitz, 285 U.S. at 464, cannot be considered neutral and detached.

NEW EMPIRICAL EVIDENCE.

Opponents of the exclusionary rule and many citizens believe the rule results in legions of criminals going free on "technicalities." Evidence from available studies strongly suggests otherwise.

A major review of research on the effects of the rule -- cited by the majority in Leon -- has been issued since the last Senate hearings held on this legislation. Thomas Y. Davies' lengthy study published in 1983 by the American Bar Foundation, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule, concluded that the "costs" of the exclusionary rule -- in terms of dropped prosecutions and lost convictions -- are actually low. Davies' research disclosed that the federal government study of the effects of the rule conducted by the National Institute of Justice (NIJ) in 1982 were misleading and exaggerated. The NIJ study had claimed that the rule was a "major" factor in lost prosecutions. Specifically, Davies found that --

- The cumulative loss -- nonprosecution or nonconviction -- resulting from illegal searches is in the range of 0.6% to 2.35% of all adult felony arrests.
- In felony arrests for offenses other than drugs or weapons possession, the cumulative loss is in the range of 0.3% to 0.7% of such arrests.
- The cumulative loss due to nonprosecution or nonconviction of those arrested on felony drug charge is likely in the range of 2.8% to 7.1%.
- Less than 1% of individuals arrested for felonies are released because of illegal searches and seizures at the preliminary hearing or after trial.

Prior studies by the General Accounting Office* and the Institute for Law and Social Research** present a fairly consistent picture of the limited impact of the exclusionary rule on felony case dispositions.

Under these circumstances, to the effort to nullify or severely limit the exclusionary rule necessary? Would its abolition result in many more cases being pursued? The data do not suggest so.

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* Report of Comptroller General of the United States, Impact of the Exclusinary Rule on Federal Criminal Prosecutions Rep. No. CDG-79-45 (Apr. 19, 1979)

** Brian Forst, Judith Lucianovic and Sarah J. Cox, What Happens After Arrest? A Court Perspective of Policy Operations in the District of Columbia, PROMIS Research Projet Publication 4 (Washington, D.C.: Institute for Law and Social Research, 1977); Kathleen B. Brosi, A Cross City Comparison of Felony Cases Processing (Washington, D.C.: Institute for Law and Social Research (Research, 1979).

AWAIT STUDY RESULTS

The U.S. Department of Justice, through the National Institute of Justice, now has a major study underway looking at the impact of *Leon* on police behavior and training practices.

Until results of this study of the Court's initial "good faith" steps are available next year, action on the pending legislation is premature.

ANY EXTENSION OF THE GOOD FAITH EXCEPTION SHOULD BE LEFT TO THE SUPREME COURT

The U.S. Supreme Court has had a number of opportunities in the fourteen months since the *Leon* and *Sheppard* decisions to grant certiorari in a case where the rule might be extended to warrantless searches. It is reasonable to conclude that the Court is giving the Circuits sufficient time to apply the new good faith exception in particular cases, and that the appropriate case or cases will be working their way up to the Supreme Court for its consideration in the coming year.

Given the Court's long-standing expressed "strong preference" for warrants, reemphasized in *Leon*, it is very clear the Court will weigh very carefully extension of the good faith exception to warrartless searches involving the "hurried judgment" of a police officer. It is no criticism to observe that it is not in the nature of a law enforcement officer to be neutral and detached.

CONCLUSION

Despite asserted claims, there is no demonstrated connection between our national crime rate and the existence of the exclusionary rule; the empirical evidence demonstrates that critics have overstated the adverse effects associated with the rule.

Further, it is clear that the Court was willing to create a good faith exception in *Leon* because of their confidence in the integrity of the magistrate review process.

The American Bar Association joins with the Administration, Congress and the public in recognizing the need to undertake concerted and effective steps to combat crime. But we believe expanding the good faith warrant exception to warrantless situations would be an unjustified expansion of this narrow exception. Constitutional issues aside, Congressional changes in the rule will undercut law enforcement professionalism, engender decades of litigation over various new tests, and result in very few additional criminals ending up behind bars.

Mr. Chairman, on behalf of the American Bar Association, I would like to thank you and the Committee for inviting us to present these views. I would be pleased to answer any questions you or members of the Committee might have.

STATEMENT OF TONY CALIFA

Mr. **Califa**. Thank you, Mr. Chairman. On behalf of the ACLU with over 250,000 members dedicated to preserving the constitutional freedoms that we all benefit from, we would like to commend you for having these hearings today.

I will be submitting a written statement on the ACLU's strong opposition to S. 237. In my oral remarks I would like to briefly highlight some of the points that I will bring up in the written statement.

We believe that S. 237——

Senator **Biden**. Professor, if you could—unless you have——

Dr. **Greenhalgh**. I have got nowhere to go.

Senator **Biden**. Good. I would like to ask a few more questions when the testimony is concluded.

Mr. **Califa**. I will be brief.

Senator **Biden**. Take your time. I want to hear what you have to say.

Mr. **Califa**. Thank you, sir.

The ACLU believes that S. 237 is undesirable and possibly unconstitutional legislation. It creates more problems than it solves.

The Supreme Court has been extremely active in the fourth amendment area, and there is no need for the Congress to pass this legislation at this time.

The fourth amendment, adopted as part of the Bill of Rights guarantees Americans the right to be free from unreasonable searches and seizures. To obtain a search warrant, the fourth amendment requires probable cause, supported by oath or affirmation, and specifically describing the place to be searched, or the person or things to be seized.

Since at least 1914, evidence gathered in violation of the fourth amendment has been excluded. It could not be presented in a Federal prosectuor's case in chief. Since *Mapp* v. *Ohio* in 1961, constitutionally tainted evidence could not be presented in a State prosecutor's case in chief.

Recently, there has been an alarming erosion of the fourth amendment's protections. As Mr. Justice Stewart points out in his 1983 Columbia Law Review article on the exclusionary rule, there are two ways to undermine the rule.

First, by weakening the protections provided by the fourth amendment, and second, by narrowing the circumstances under which the exclusionary rule applies.

The Supreme Court has used both methods quite frequently in the past 15 years. The Supreme Court's efforts in the area of governing search and seizure has allowed poiice and prosecutors to gauge with increasing certainty their diminished fourth amendment responsibilities. By simplifying the area of the fourth amendment over this 15-year period, the Court has expanded the range of permissible police activity, and drastically reduced the need for a good faith exception.

For example, *Terry* v. *Ohio* upheld street stops and defensive frisks on less than a probable cause. In *Schneckcloth* v. *Busamonte,* an expansive definition of consent searches was adopted.

United States v. *Robinson* gave police broad power to search incident to a lawful arrest. In a case that was handed down last year, *New Jersey* v. *TLO,* a school official's warrantless search of a student was allowed.

And we have many more examples of cases diminishing fourth amendment rights. *United States* v. *Colandro* where the grand jury process was exempted from the exclusionary rule. *Stone* v. *Powell* which severely limited Federal habeas corpus relief on search and seizure grounds.

So the point of this is that the Court has been steadily eroding the areas to which the fourth amendment applies. In the crucial area of probable cause, the Supreme Court, in *Illinois* v. *Gates,* permitted probable cause to be found on the basis of an anonymous informant's tip, so long as the, quote, "totality of the circumstances," end quote, gave rise to a commonsense determination that there is a fair probability of criminal activity. This is a very flexible test, given the extremely generous reading given to law enforcement concerns by the Court during the last 15 years.

All of this put together makes the recognition of a subjective good-faith defense, which is contained in S. 237, both unnecessary and potentially dangerous.

Given the flexibility of the probable cause standard, the introduction of a subjective good-faith defense is merely an invitation to water down the fourth amendment probably cause standard even further.

This is especially true, given the decisions in *Leon* and *Sheppard,* which the Senator and Professor Greenhalgh have so ably examined.

There, an objective good-faith exception to the exclusionary rule was created. Those cases dealt with reliance by officers on a neutral magistrate's search warrant in gathering evidence, and the Court said that that evidence was admissible even if the warrant was deficient and did not conform to the fourth amendment.

We do not think that *Leon* and *Sheppard* were decided correctly. We will take further opportunities to argue our case before the Supreme Court on these issues.

We certainly think that Congress should not be considering legislation that takes those two cases even further. Our candidates for codification would be *Weeks* and *Mapp*. The interesting question to the ACLU, and other people concerned about civil liberties is, What are we left with, as fourth amendment protections after *Gates*, *Leon*, and *Sheppard?*

Evidence pursuant to a warrant is admissible even though police lacked, quote, "a substantial chance," quote, "that evidence of a crime would be found, so long as they had a reasonable belief that they had a substantial chance of uncovering criminal activity."

The bill would take this one step further. It would further attenuate this standard, by removing the need for an objectively reasonable belief, and relying totally on subjectivity.

Also of course the good-faith exception would apply to warrantless searches, and this is a very important point, as Professor Greenhalgh has pointed out. The classic fourth amendment theory would call for the application, by a police officer who was involved in ferreting out crime, to a neutral and detached magistrate.

We believe that the fourth amendment rule, as it stands now, relying on this objective test that *Leon* and *Sheppard* came out with, and with the weakened probable cause standard enunciated in *Gates*, allows police to search and seize in a very easy manner, that it creates standards that are not difficult to meet. If S. 237 would pass, it would allow police to search and seize based upon basically unreviewable hunches and suspicious. This would amount to a constructive repeal of the fourth amendment, and, I would direct the Senator to footnote 13 in *Leon*, which—in the majority opinion in *Leon*, which talks about subjective good faith, and says that the *Leon* case is not about subjective good faith, and, for that reason alone, clearly, S. 237 is not a codification of *Leon*, but goes substantially beyond those cases.

In conclusion, the ACLU believes that S. 237 should not be reported favorably. The Supreme Court has certainly made it easy to meet the probable cause standard, has restricted the situations where the fourth amendment applies.

In *Leon* and *Sheppard*, the Court has allowed evidence to be admitted even though that evidence was obtained in violation of the fourth amendment.

As our written statement will show, the cost of the exclusionary rule was never very high, and the benefits include better police training and more careful thought before embarking on search or seizure activities.

Thank you, Mr. Chairman.

[The statement follows:]

TESTIMONY

OF

ANTONIO J. CALIFA
LEGISLATIVE COUNSEL

THE AMERICAN CIVIL LIBERTIES UNION

ON

S.237 "EXCLUSIONARY RULE LIMITATION ACT OF 1985"

BEFORE THE SENATE JUDICIARY COMMITTEE

Exclusionary Rule

S.237 - "Exclusionary Rule Limitation Act of 1985"

Mr. Chairman, thank you for the opportunity to submit testimony on behalf of the American Civil Liberties Union (ACLU). The ACLU is an organization with over 250,000 members committed to the defense of constitutional values and the Bill of Rights. One of the most important protections that Americans have traditionally enjoyed is the Fourth Amendment's protection against government intrusion into their privacy. The ACLU is strongly opposed to S.237. We believe the bill to be unnecessary, undesirable and unconstitutional. The Bill does not solve problems, it creates them. The ACLU strongly supports preserving the Fourth Amendment guarantees against government invasion of privacy. The Fourth Amendment of the United States Constitution, adopted in 1791 reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

THE FOURTH AMENDMENT IS AN EXCLUSIONARY RULE

This is a fundamental and indispensible freedom. The Fourth Amendment prohibits the use of illegally obtained evidence in a criminal trial. The Fourth Amendment provides a remedy for its violation. The Supreme Court decided unanimously in Weeks v.

United States 232 U.S. 383, 58 L Ed 652 (1914) that the Fourth Amendment itself and requirements of judicial integrity require the exclusion of such evidence. The illegal search and seizure is part of a larger enterprise - the presentation of the evidence to a trial court. The Courts may not insulate themselves from the entire illegality.

From 1914 to 1984, evidence that was obtained by means which did not meet the Fourth Amendment standard was excluded. The use of the exclusionary rule can be traced clearly to Weeks v. United States. There, a United States Marshall entered defendant's house and without permission removed defendant's correspondence. The United States Marshall did not have a warrant to search. The question before the Weeks Court was whether illegally seized evidence, obtained without a warrant would be used in the subsequent trial.

The Court decided as follows:

> "If letters and private documents can ... be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his rights to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The effort of the courts and [federal] officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshall could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution... Instead, he acted without sanction of law, doubtless prompted by the desire to

> bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action....To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibtions of the Constitution, intended for the protection of the people against such unauthorized action." 232 US, at 393-394, 58 L Ed 652, 34 S.Ct.341.

Since that decision, the law on search and seizure has been developing to fit different factual situations. For seventy years, the Fourth Amendment and the exclusionary rule prohibted the introduction of evidence which had been obtained in a method that violated Fourth Amendment requirements.

LEON AND SHEPPARD HAVE CREATED AN OBJECTIVE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE

In two 1984 cases, the Court narrowed the applicability of the exclusionary rule. In Leon v. United States 82 L Ed 2d 677 and Massachusetts v. Sheppard 82 L Ed 2d 737, the Court allowed evidence that had been illegally obtained to be introduced by the prosecution in its case in chief. The ACLU filed an amicus brief in these cases. It believes that the cases were decided incorrectly and will take further opportunities to argue against the continual erosion of the exclusionary rule. However, the focus of this testimony must necessarily be S.237 and not the two Supreme Court cases. Additionally, as will be seen later, the bill goes much further than do the cases in eroding Fourth Amendment protections.

In Leon, the Court was faced with a situation where a warrant was issued by an independent judicial officer, but lower courts had ruled that the warrant should not have issued because there was no probable cause. The District Court concluded that the affadavit submitted in support of the issuance of a search warrant was insufficent to establish probable cause. Although the police officer asking for the warrant acted in good faith, the Fourth Amendment exclusionary rule required that evidence be suppressed. The Ninth Circuit affirmed, and the Supreme Court reversed.

The Supreme Court held that the exclusionary rule should not be used to bar evidence gathered by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate but ultimately found to be unsupported by probable cause. In reaching this conclusion, the Court emphasized that the exclusionary rule was meant to be a deterrent measure. In situations where a police officer had in good faith obtained a search warrant from an independent magistrate, there could be no deterrent effect. There was nothing more for the police officer to do. Weighing the cost of excluding probative evidence versus the deterrent effect, the court found the evidence to be admissable where the officer had acted in good faith and there was no illegal behavior to deter.

In Massachusetts v. Sheppard, the Court went even further. The search warrant used in that case asked for permission to search for controlled substances, when the police were really interested in searching for evidence concerning a murder. Thus, the warrant was defective in misstating the items which were seized. The Court said the evidence was admissible when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently was determined to be invalid.

S.237 GOES MUCH FURTHER THAN LEON AND SHEPPARD IN LIMITING THE EXCLUSIONARY RULE AND UNDERMINING THE FOURTH AMENDMENT

S. 237 differs in crucial areas with the Supreme Court rulings discussed above. First, the bill makes evidence admissible if the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the Fourth Amendment. Second, a showing that evidence obtained pursuant to a warrant is *prima facie* evidence of good faith belief unless the warrant was obtained through intentional and material misrepresentation.

Let us examine the first provision of S. 237. If the officer believes he was acting in accord with the Fourth Amendment, the evidence he obtains is admissible. This is a serious infringement of the Fourth Amendment. In what other situation involving the Bill of Rights does an officer's *belief* that he is acting correctly *excuse* the violation of constitutional rights? Can the First Amendment be violated as long as the violators believe they are acting in good faith?

Clearly, most Americans would be outraged with such a result. Indeed, the Supreme Court might find fault with such an approach. Since its 1964 decision in *Beck* v. *Ohio* 379 U.S. 89, 97 (1964), the Court has rejected subjective good faith, as an excuse for violating constitutional rights.

Justice Potter Stewart has analyzed the problem as follows:

> "[I]f the ['reasonable good faith' belief proposed is a] proposal to tolerate searches and seizures where, despite the deference given to the magistrate's determination [Illinois v. Gates], a reviewing court cannot conclude that the police officer had probable cause . . . even while giving the officer the benefit of the doubt where he reasonably relied on a mistaken view of the law or the facts . . . it approaches the "subjective" good faith approach condemned by the Supreme Court . . . in Beck v. Ohio . . ."

In Leon, the Supreme Court went to great lengths to distance itself from the subjective good faith approach. In footnote 13, Justice White wrote that the arresting officer's good faith was not enough. He added that if subjective good faith were the standard the Fourth Amendment would apply only in the discretion of the police.

S. 237 adopts a subjective good faith standard. In so doing, the drafters of the bill have gone contrary to more than twenty years of rulings by the Supreme Court rejecting the subjective good faith standard. Perhaps, the most convincing evidence that subjective good faith makes S.237 constitutionally suspect is the Administration's proposal of an amendment that would include the words "objectively reasonable belief."

Congress cannot pass a statute that violates the Constitution, and should reject S. 237 on this basis alone. Because S. 237 through use of subjective good faith repudiates the probable cause standard and allows evidence to be introduced where less that probable cause was present. Such a repeal of the probable cause standard cannot be accomplished by statute, and the bill is constitutionally invalid.

Finally, and most importantly, Leon and Sheppard were cases where a police officer conducted a search pursuant to a warrant. Indeed, in both cases, the Court noted that the police officers had their warrants reviewed by police supervisors and attorneys from the District Attorney's office before presentation of the warrants to a neutral magistrate. It is classic Fourth Amendment doctrine that absent special circumstances requesting warrants is preferable to officers conducting searches without warrants. Leon and Sheppard do not create an exception for officers acting in good faith without warrants. Since S. 237 does, it clearly goes further than the Supreme Court.

S. 237 UNDERMINES THE FOURTH AMENDMENT COMMAND THAT WARRANTS BE ISSUED ONLY WHERE THERE IS PROBABLE CAUSE

The bill's second major clause provides that a showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of reasonable good faith unless the warrant was obtained through intentional and material misrepresentation. The Fourth Amendment reads:

> ". . . no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons on things to be seized."

The only explicit limit set by S. 237 is that there be no intentional and material misrepresentation. What happened to the probable cause standard? Why is this concept, with many years of federal and state judicial interpretation, being replaced by "reasonable good faith" and "intentional and material misrepresentation"? What can rebut the prima facie evidence that the officer acted in reasonable good faith? Since intentional and material misstatements are mentioned, why wern't the other exceptions to the Leon and Sheppard rule acknowledged i.e. 1) no neutral magristrate, 2) no indica of probable cause in affadavit and 3) facially deficent unparticularized warrant? Does the bill mean that a magistrate's decision to issue a warrant will not be reviewed except where the defendant can show that the officer lied to the magistrate? And that this lie was material? Such an interpretation would make the determination of the magistrate practically unreviewable. Fourth Amendment protections would be weakened greatly. If seizure of evidence pursuant to a warrant renders such evidence admissible at trial even if the magistrate lacked probable cause such a development would effectively eliminate the requirement at the historical heart of the Fourth Amendment that "no warrants shall issue, but upon probable cause."

IN LIGHT OF GATES AND OTHER DEVELOPMENTS IN FOURTH AMENDMENT LAW S. 237 UNNECESSARY

The Fourth Amendment requires that before a warrant is issued there exists "probable cause". If law enforcement officials can persuade an independent judicial officer, usually a federal magistrate that there is probable cause, a search warrant will be issued. The applicable "probable cause" test was enunciated by the Court in Illinois v. Gates 76 L Ed 2d 527 (1983). In Gates the Court held that "the task of an issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affadavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place."

In Gates the Court redefined the concept of probable cause upon which a search warrant should issue. The Court said that probable cause is a fluid concept not readily or even usefully reduced to a neat set of legal rules. Probable cause requires only the probability and not a prima facie showing of criminal activity. The decision on probable cause calls for a practical common sense judgment.

Thus, it doesn't take much for a magistrate to issue a valid search warrant. A reviewing court will accord the magistrate's decision great weight. On review, the court will ask whether the magistrate had a "substantial basis" for believing that there was a probability or substantial chance of criminal activity. Obviously, the Gates test is much more easily met than the "two-pronged" test of Aguilar-Spinelli. S. 237 would add a good faith exception to this already minimal rule. The result would be soft indeed. As Professor Yale Kamisar has written:

> "To say that evidence obtained pursuant to a warrant should be admissible even though the police lacked a 'substantial basis' for a 'substantial chance' of criminal activity so long as they had a reasonable belief that they had a 'substantial basis' for a 'substantial chance' is almost mind-boggling."[27]

Yet, this is the standard today, after the Leon and Sheppard decision. As interpreted by its appropriate interpreter, the Supreme Court, the standard has become quite easy to comply with. For the Senate to go further is unnecessary.

A SUBJECTIVE GOOD FAITH DEFENSE REWARDS POLICE IGNORANCE AND WOULD BE DIFFICULT TO ADJUDICATE

The Supreme Court in Leon and Sheppard was careful to emphasize that they rejected a subjective good faith exception to the exclusionary rule. As has been discussed, this has been consistent constitutional doctrine since Beck v. Ohio in 1964. The Supreme Court adopted a standard of objective reasonableness. S.237 has a subjective good faith standard. The difference between these two concepts is very important.

Objective reasonableness places limits on willful ignorance. The standard is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.

A subjective good faith defense places a premium on providing as little training as possible to police. For example, Delaware v. Prouse 440 U.S. 648 (1979) clarified the extent to which automobile searches could be executed. Under an objective reasonableness standard, police would have a powerful incentive to understand the law--because they would be expected to know the law. If, however, illegally seized evidence is admissible as long as the officer was acting in good faith, police officers would have an incentive not to know Fourth Amendment doctrine. Thus, an officer who was never informed of Delaware v. Prouse and conducted a search that violated the standard of that case could be acting in complete good faith, and have his evidence admitted.

S. 237 would impose an intolerable burden on the courts. The good faith exception it creates would become an adjudicatory horror. Each time defense counsel filed a motion to suppress, prosecutors would counter with a good faith argument. Judges would have to probe the subjective knowledge of the searching officer. Evidence other than the officer's self-serving testimony would be scarce. As was said in *Massachusetts* v. *Painten* 389 U.S. 560 (1968) (White J., dissenting), "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resource."[3]

THE EXISTING EXCLUSIONARY RULE IS NOT A SERIOUS IMPEDIMENT TO FEDERAL LAW ENFORCEMENT

The "cost" of the exclusionary rule is nothing more than doing without evidence which the founders determined should never have been obtained in the first place. Studies have shown that adherence to the Fourth Amendment and use of the exclusionary rule does not result in large numbers of criminals being set free. As the leading commentator on search and seizure cases has written:

> It simply is untrue that the exclusionary rule generally imposes high costs through lost convictions. To date, the most careful and balanced assessment of all available empirical data shows "that the general level of the rule's effects on criminal prosecutions is marginal at most."
>
> "Specifically, the cumulative loss in felony cases because of prosecutor screening, police releases, and court dismissals attributable to the acquisition of evidence in violation of the fourth amendment is from *0.6% to 2.35%* (from 0.3% to 0.7% if drug and weapon cases are excluded). This same study points out that the available evidence does not show that defendants gain favorable plea bargains because of the exclusionary rule.[4]

One of the leading studies on costs, the GAO report, fully confirms Professor LaFave's judgment that "the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed."5/ A recent independent study (funded by LEAA) showed that in five localities, declinations for all due process reasons--not just search and seizure--ranged from 1% of rejected cases in the District of Columbia, 2% in Salt Lake City, 4% in Los Angeles and 9% in New Orleans.6/

The conclusions of the NIJ study are both exceptionally misleading and seriously flawed. Quoting from the report's summary, NIJ claims that "4.8%, or the more than 4,000 felony cases declined for prosecution [statewide] were rejected because of search and seizure problems." Yet the relevant measure of the rule's cost is not what percent of _rejected_ cases (86,033) were rejected for Fourth Amendment reasons, but what percent of felony complaints (520,993) were so rejected; and on that basis, the NIJ statistics show that less than 0.8% arrests made by police were declined for Fourth Amendment reasons. A devastating critique of the NIJ material can be found in the study published in American Bar Foundation Research Journal.7/

CONCLUSION:

Because of recent Supreme Court action in drastically reducing the application of the exclusionary rule, further reduction is unnecessary. Indeed, the weakening of the exclusionary rule contemplated by S.237 is unconstitutional and extremely undesirable. S.237 introduces the troublesome concept of subjective good faith and undermines the constitutional standard of probable cause.

The "cost" of the exclusionary rule, even before its recent and drastic weakening, was not great. For all these reasons, S.237 should not be reported out by this Committee.

Ref. 09ER004

END NOTES

1. Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search -and- Seizure Cases 83 Colum L. Rev. 1365, 1401 (1983)

2. Choper, Jesse, Kamisar, Yale and Laurence Tribe, Vol. 5. The Supreme Court: Trends and Developments 1982-1983.

3. This discussion is more full developed in La Fave, W. "The Seductive Call of Expediency": United States v. Leon, Its Rational and Ramifications." 1984 U. Ill. L. Rev. 895, 913.

4. LaFave, ibid. citing Davies, "A Hard Look at What We Know (and Still Need to Learn) about the Costs of the Exclusionary Rule: The NIJ Study and other studies of "Lost" Arrests, 1983 Am. B. Found Research J. 611.

5. W. LaFave, Search and Seizure Section 1.2 n.9 (1981 Supp).

6. Brosi, A Cross-City Comparison of Felony Case Processing (INSLAW 1979) at 19.

7. See Footnote 4 above.

Senator BIDEN. Thank you. Mr. Califa, let me ask you to pursue the last point you made, that this legislation would in fact put in motion a subjective good faith as opposed to an objective good-faith standard.

In fact would there not be—would it not result in an objective good-faith standard because the Court would determine what constituted good faith? They would set objective standards by which to make the judgment?

They may not satisfy us; you may not like them.

On the one hand, I think that those who are pushing this legislation are just dead wrong, quite frankly, in portraying the number of cases where the implementation of the exclusionary rule has resulted in a defendant not being convicted, but who, otherwise, by societal standards should be convicted.

But it seems to me you exaggerate the case when you talk about this being a subjective good-faith standard, because will not the Court make the judgment as to whether or not there are enough objective facts to support the belief, by the officer, that he was acting in good faith?

Mr. CALIFA. Senator, I belive that a hearing concerning. suppression of evidence would start out by the police officer saying, "I really believed that something bad was going on."

Senator BIDEN. Let us just play act a little bit. I am the judge. I am going to say, "Well, what made you believe that?"

Mr. CALIFA. "I just had this suspicion. I had this hunch. I've been a police officer for 20 years, and I really think there was something going on there."

Senator BIDEN. "And I've been a judge for 47 years and I know you all lie lots of times, and I don't believe you." I mean, I just—see, I just cannot picture many judges, even the most conservative judges, sitting there and saying, when a police officer looks at him and says, "Just had a hunch, just had a feeling," that that would constitute a sufficient cause for the Court to say, "All right. Well, you had a hunch, I guess, even though you, by any objective standard, violated the fourth amendment rights of that individual, then we're going to allow that in evidence."

That is not to suggest we should pass this. I want to make sure that you all understand where I am, and I understand, as best I can, what would be the likely impact of passage of this legislation, which I oppose.

Mr. CALIFA. Yes, sir. Let me try and go at it from another direction. In cases where the issue is, was the officer acting in bad faith—torts cases—very often, the inquiry turns into the state of mind of the police officer at the time he, or she, did something. The Court——

Senator BIDEN. The burden of proof is different there, though.

Mr. CALIFA. Who knows where the burden of proof is going to be under S. 237?

Senator BIDEN. Well, will not the burden be upon the police officer, I mean, to justify that he fits within the exception? It is clearly the burden, whereas, in the tort case, the burden is on the plaintiff to prove that the police officer, in a civil case, acted in bad faith. I mean, it is really a shift of the burden.

Mr. **Califa**. Well, under S. 237, the defendant will be moving to suppress, so the burden would be on the—I guess, although it does not spell it out—the burden should be on the defendant to show that the police officer was acting in bad faith.

Senator **Biden**. Well, the way I think it would work is, the defendant moves to suppress the evidence as a violation of his fourth amendment rights, and the State comes back and says, well, on its face that is true, it is a violation, but we acted in good faith, thereby getting us out from under the requirement. Therefore, the burden is on the State to make that case, and that is in fact a—I mean, all I am trying to do here is to make sure that I am precise about what is at stake here, and what me are talking about. Were I to make your argument on the floor of the U.S. Senate, in opposition to this legislation, I think some of my competent, well-trained legal colleagues, colleagues with legal backgrounds, would be able to point out to me that I was mistaken in comparing the burden under a tort, proving bad faith on the part of an officer, and the burden of an officer having to prove good faith under this exception to the fourth—what would otherwise be—Professor, have you a comment?

Dr. **Greenhalgh**. You are correct. *Leon* so holds. The *Gant* case is very, very specific in its interpretation about the burden being on the prosecution.

Senator **Biden**. And I cannot imagine—I mean, we cannot legislatively alter that, at least——

Dr. **Greenhalgh**. Well, you can try.

Senator **Biden** [continuing]. We can attempt to. I agree, we could try, but it would not be constitutional. I do not know how you could constitutionally do it.

Dr. **Greenhalgh**. You see, that is the whole difficulty, you know, the attack on the warrant clause, as this legislation, at least in our judgment, is designed to go forward. You have those nine exceptions to the warrant clause, one of which now is the good-faith warrant exception to the warrant clause itself.

Senator **Biden**. Yes.

Dr. **Greenhalgh**. And you are trying to—I mean, other people are trying to add S. 237 to a growing——

Senator **Biden**. No; I agree. I understand that.

Dr. **Greenhalgh**. You are absolutely correct. I mean, *Gant* says it, interpreting *Leon*, and if you read *Leon* carefully, there is no question about it.

Senator **Biden**. Now, one of the other questions that I have and I apologize for trespassing on your time for so darn long here but——

Dr. **Greenhalgh**. You are just revving me up for tonight for guess what I am going to teach tonight? One of your cases. *Delaware* v. *William J. Prowse*.

Senator **Biden**. God, I am glad I am not back in law school because my mind—I would be going, geez, what is that case, what is that case?

Dr. **Greenhalgh**. Random stop.

Senator **Biden**. All right. Thank you. You know, it has been a long time since I felt that feeling in the pit of my stomach where, knowing I have not read the cases on the night before and briefed them, I am going to walk into my professor's class, and I am going to be the 1 out of 120 he is going to look at and——

Dr. **Greenhalgh**. Several of my students have left this room in order to do just that.

Senator **Biden**. As a matter of fact, Professor, several of my colleagues and former professors have indicated to me that they believe that the best training I ever received for the job I now hold, was having to stand before the entire class, and Professor Anderson, and explain cases that I clearly had not read.

But at any rate, let me—that is off the record. My son may read the record some day.

Let me conclude by asking a couple of questions on behalf of Senator Kennedy.

Professor, have you had an opportunity to review Mr. Trott's proposed amendments to S. 237 which we only received last night?

Dr. **Greenhalgh**. No; I have not.

Senator **Biden**. Well, what I would like to do on behalf of Senator Kennedy and the committee is submit them to you and ask you if you would take a look at them and for the record make——

Dr. **Greenhalgh**. All right. We will be happy to.

[The information follows:]

American Bar Association

October 17, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Honorable Joseph R. Biden
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Thurmond and Senator Biden:

During my testimony on behalf of the American Bar Association before the Committee on October 2 concerning S. 237, exclusionary rule legislation, I was asked to provide in writing the ABA's views on amendments to S. 237 proposed by the Department of Justice. I am pleased to submit ABA comments on these amendments.

Proposed section 3508 appears to be essentially a restatement of the language in S. 237 extending the good faith warrant exception established in U.S. v. Leon, 104 S.Ct. 305 (1984) to warrantless situations. As I testified before the Committee, the ABA does not believe expansion of this narrow exception is warranted or desirable.

Expansion of the good faith warrant exception to warrantless searches would undermine the integrity of the warrant review process conducted by detached and neutral magistrates. An arrest without a warrant bypasses the safeguards provided by an objective pre-determination of probable cause -- and substitutes instead a far less reliable procedure of an after-event justification for the arrest or search.

Moreover, proposed section 3508 tracks language in S. 237 which would sweep away the four criteria established in Leon where suppression is still appropriate in warrant cases. Enacting a lesser standard for assessing objective good faith than that established by the Supreme Court in Leon is unwise and may be unconstitutional.

Proposed section 3509 is equally troubling. This section would limit the application of the exclusionary rule in non-constitutional situations. In effect, this section would overturn the U.S. Supreme Court's decisions in Mallory v. U.S., 354 U.S. 449 (1957) and Miller v. U.S., 357 U.S. 301 (1958), and their progeny, which applied the exclusionary rule in non-constitutional cases. In Mallory, the Supreme Court held that a confession obtained while the defendant was unlawfully detained in violation of Rule 5(a) of the Federal

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Rules of Criminal Procedure, which requires that a person under arrest be taken to a committing magistrate without unnecessary delay, was inadmissible. In Miller, the Court found a violation of 18 U.S.C. §3109, which deals with entry to execute a warrantless arrest, an arrest warrant and/or a search warrant, and suppressed evidence seized after the defendant's arrest. Miller also emphasized the importance of traditional fair procedural requirements:

> However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house.

Miller v. U.S. at 313.

It should also be noted that Title 23 §524 of the District of Columbia Code incorporates by reference §3109. Enactment of proposed section 3509 could unwittingly undercut important protections afforded by §3109. It could affect the santuary of every citizen residing in the District of Columbia.

Recent decisions indicate that the Supreme Court is attempting to tailor the exclusionary rule to those circumstances where its deterrent function will be served. Proposed section 3509, by contrast, would curtail the rule without regard to its important deterrent role.

Sincerely,

William W. Greenhalgh

William W. Greenhalgh
Former Section Chairperson

WWG:dc

cc: Members, Committee on the Judiciary

Senator BIDEN. And I would also like to ask the ACLU whether they have had an opportunity to do that. If they have not, would they also submit for the record—would you also do that for us? Apparently Mr. Trott suggested several amendments. I did not hear the beginning of his testimony, and rather than us discuss them now, it would be more useful to me and to the committee if each of you could take a look at them.

One of them is on page 7 of today's testimony, but if you do not have a copy of the testimony, we will see that you have it.

Mr. CALIFA. Senator, we would be glad to do that.

[The information follows:]

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October 24, 1985

Senator Strom Thurmond
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Dear Senator Thurmond:

We testified on S.237 ("Exclusionary Rule Limitation Act of 1985") on October 2, 1985. During our testimony, Sen. Biden asked us to comment on two amendments proposed by Assistant Attorney General,StephenS.Trott,Criminal Division, Department of Justice. The amendments were proposed on October 2, and we did not have an opportunity to review them prior to that date. We appreciate the opportunity to commentonthese proposed amendments.

The Justice Department's proposed amendment Sec. 3508 would make a very significant change in the bill before the committee. The proposed amendment would not exclude evidence obtained as a result of a search or seizure, if the search or seizure was undertaken in an "objectively reasonable belief" that such action was in conformity with the Fourth Amendment. S. 237, as introduced by you, would not apply the exclusionary rule to evidence obtained as a result of a search or seizure, if the search or seizure was undertaken in a "reasonable good faith belief" that it was in conformity with the Fourth Amendment.

Mr. Trott's proposed amendment attempts to correct a basic flaw in S. 237. The bill's reliance on subjective good faith makes the bill unconstitutional. The Court clearly rejected the subjective good faith standard in United States v. Leon 82 L Ed 2d 677, 693 (1984).

The Department of Justice amendment, 3508 attempts to meet the constitutional standard by excusing Fourth Amendment violations "if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the Fourth Amendment." Proposed Sec 3508 still misses the constitutional mark. By using the term "belief", proposed Sec. 3508 uses a standard that is too subjective. Mr. Justice White wrote in United States v. Leon:

> "...[W]e also eschew inquiries into the subjective belief of law enforcement officers.... Accordingly, our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."

The objective question to be answered is whether a reasonable, well-trained officer would have acted in a certain way. The officer's belief is not the appropriate inquiry under Leon. Also see Harlow v. Fitzgerald 73 L Ed 2d.396, 410-411 (1982) cited by Mr. Justice White in Leon.

In Harlow v. Fitzgerald the standard is the objective reasonableness of the officals conduct. If the officals' conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, the offical is shielded from civil damages.

Moreover, the proposed amendment does not cure the problem of permitting warrantless searches. The long standing preference for obtaining warrants before conducting a search is undermined by proposed Sec. 3508. The proposal extends Leon and Sheppard to warrantless searches. In so doing, the proposal ignores a basic premise of the Fourth Amendment. that a detached and neutral magistrate will be better able to determine the existence of probable cause than a police officer. By allowing searches and seizures, without warrant, if an officer believes he is acting constitutionally, an important incentive for obtaining a warrant is removed.

Proposed Sec. 3508 does not contain the "four exceptions" to the Leon holding. Only one of the exceptions is mentioned. Since intentional and material misstatements are mentioned, why aren't the other exceptions acknowledged, i.e. 1) no neutral magistrate, 2) no indicia of probable cause in an affadavit and 3) a facially, deficient unparticularized warrant? Indeed, the third 'exception' is much more that that. It is a part of the Constitution. A warrant must describe with particularity the place to be searched and the persons or things to be seized.

The second Justice Department amendment, proposed Sec. 3509, makes clear that the limitation in the exclusionary rule legislation would apply to all areas not just to criminal trials. The amendment states the evidence cannot be excluded in any federal court on the ground that it was obtained in violation of a statute, rule of procedure or regulation, except as specifically provided by statute or rule of procedure.

First, this is a provision on which we have not had an opportunity to testify. We need to know the practical effect of this proposal. Which statutes, rules of procedure or regulation is the Department of Justice concerned about? The situations of which we are aware where a statute has been cited as the reason for exclusion involve violations of congressional enactments proscribing police conduct. For example, in United States v. Moreno 701 F 2d 815 (9th Cir. 1983), evidence was excluded because it had been obtained in violation of 18 U.S.C. 3109 which allows agents in executing a search warrant to break down doors or windows for entry or exit if they first knock and identify themselves. The purpose of the statute is to prevent violence. The Court in Moreno excluded evidence because officers had not complied with the statute. In United States v. Chemaly 741 F 2d 1346 (11th Cir 1984) evidence was supressed for violation of the present 31 U.S.C. 5317 (a) which calls for a search warrant based upon probable cause when treasury agents want to search suspected currency violators.

In Rea v. United States 100 L. Ed. 233 (1956) the Supreme Court considered the appropriate remedy when a federal agent obtained evidence in violation of 41(c) Fed. R. Crim. P., the equivalent of a federal statute governing issuance of search warrants. The Court excluded all evidence.

> "The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruit of his unlawful act either in federal or state proceedings."

These cases are eminently well-reasoned and protect the privacy rights inherent in the Fourth Amendment. The Department of Justice bears a heavy burden in support of this radical measure (proposed Sec. 3509) which would repeal Fourth Amendment protections in all statutory situations, except where the statute specifically provides for exclusion. Very few of these statutes will provide specifically for exclusion. At the time of enactment, the universal remedy for an illegal search was exclusion of the evidence.

In summary, although the first Justice Department amendment is marginally better than S.237 it is still unacceptable for the reasons stated. The second Trott amendment vastly expands the bill's scope, and we strongly oppose it. Also, we reiterate our objections, enunciated in our testimony on S. 237, to any further erosion of Fourth Amendment rights.

We would be pleased to testify on these provisions or to otherwise answer any questions you may have about our position.

We respectfully request that this letter be made part of the hearing record.

Very truly yours,

Antonio J Calif

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Legislative Counsel

AJC:dyt

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Mr. CALIFA. Let me just clarify one point.

Senator BIDEN. Sure.

Mr. CALIFA. I did not mean to suggest that *Leon* had a subjective good faith test.

Senator BIDEN. I did not think you did.

Mr. CALIFA. OK. What I will try and point out in my, in the ACLU's written testimony, is that the objective reasonableness test of *Leon* is watered down, we think, or could be read to be watered down by S. 237.

Senator BIDEN. I do not disagree with that. I was just relating—I was talking about the burden issue and I wanted to make sure I was not misunderstanding something here.

Mr. CALIFA. You are right about that.

Senator BIDEN. Also, Senator Kennedy has several, as a matter of fact two—well, I will just ask them now, if you have time.

Mr. Trott's printed testimony says that the Supreme Court has, quote, "now laid to rest any real argument that the exclusionary rule is constitutionally required." Is not that statement a little strong and, would you not suggest that it needs some qualification?

I will start with you, Professor.

Dr. GREENHALGH. Well, there has been considerable discussion with regard to whether or not it is constitutionally mandated, but I think—you know—I still do not see how anybody can get around *Mapp* v. *Ohio*, written by Justice Clark. What he says, we are now taking *Wolf* v. *Colorado* which we decided in 1949, where we said it is in the concept of ordered liberty but we are not going to force on the States at this time an exclusionary rule. We are going to let them work their will and see what happens.

Twelve years later, *Mapp* was decided, and there is nothing in there more explicit than it is a violation of the due process clause to admit illegally seized evidence, either lack of probable cause or an illegal search and seizure.

Now that is the highest Court, true, by a 5 to 4 decision. Many of our decisions are 5 to 4. The highest Court interpreting the Supreme Court—I mean, interpreting the constitution of the United States, that *Weeks* is now the law of the land, and, going forward on the well over a hundred cases, maybe close to 170 cases since *Mapp*, interpreting—it has always been whether it is a State or a

Federal, interchangeability with regard to the Federal constitutional issue.

I do not see that as something that could be said that strong.

Mr. CALIFA. We agree, Senator, with Professor Greenhalgh's statement, and would refer you to Justice Stewart's statement in *Elkins* v. *United States,* 364 U.S. 286. In talking about the exclusionary rule he said: "The rule compels respect for the constitutional guarantee, and the only effectively available way, by removing the incentive to disregard it."

We think that is as true today as it was then.

Senator BIDEN. As Senator Kennedy points out here, if the exclusionary rule lacks any constitutional underpinning, it is difficult to explain the limits Justice White put on the good faith exception in *Leon.*

Dr. GREENHALGH. The four exceptions that Justice White wrote are steeped in constitutional history.

Senator BIDEN. That is the point.

Dr. GREENHALGH. I mean, *Franks* v. *Delaware*—you know—a perjurious or reckless disregard with regard to information contained in an affidavit. Lo-Ji Sales: a magistrate who goes on the raid with the police officers to raid porno stores, whether he was neutral and detached.

Brown v. *Illinois,* one of the leading cases on the fourth amendment, so lacking an indicia of probable cause, as well as facially deficient as far as a particularity clause. Oh, that is in the constitution, particularity.

Senator BIDEN. It is sort of a "catch-22" position, as again Senator Kennedy points out here, that if in fact those who argue, like *Trott,* that there is no constitutional requirement for the exclusionary rule, then how can the Federal courts require the State courts to recognize the good faith exception?

Dr. GREENHALGH. Let me just digress for a moment, Senator. What the attorney general from Florida—true, the people of Florida spoke out on a constitutional amendment saying the supreme court of our State can go no higher than the supreme court of the State of Florida. In other words, in interpreting Federal Constitution standards.

The same thing happened in California. The people of California rose up and passed proposition 8, which said you cannot decide any cases that are not in conformity—the same kind of language that is in S. 237.

And in February of 1985, the Supreme Court of California said, as far as we are concerned, that they can never establish an independent and adequate State ground upon which to base fourth amendment issues.

Now that is a trend that is going on nationally now. On the second part of independent and adequate State grounds, if—and this is yet to be seen, because I am trying to follow this as part of my professorial responsibilities—in looking at the 50 State supreme courts, whether or not *Leon* and *Sheppard—Leon* is going to be rejected, coming down, and those interpretations of their own, fourth amendments, are going to say, as far as we are concerned, this is as we interpret our own State constitution, our own decisional law, our own exclusionary rule, and therefore, we will ignore the Supreme Court of the United States.

Several states have done that, in *Illinois* v. *Gates,* but yet, we are 14 months into this, and we are still watching it very carefully.

Senator **Biden**. Well, I am going to submit for the record, the rest of the questions. Some are from Senator Kennedy. Chairman Thurmond would like the record to be kept open until Friday for statements and/or questions, and, there is a statement by Senator Kennedy that I would like put in the record at the beginning of the hearing, and a statement by Senator Grassley, who ought to follow the statement by Senator Kennedy.

Gentlemen, I sincerely thank you for your time, your interest, and your effort, and I warn you that I and others may be back to you for some assistance as this matter moves on. Thank you very much. The hearing is ended.

[Whereupon, at 12:49 p.m., the hearing was concluded.]

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